Supreme Court, U.S.
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In The

Supreme Court of the United States

NORMAL PARM, JR., ET AL.,

Petitioners,

v.

MARK SHUMATE, in his official capacity as Sheriff of East Carroll Parish, Louisiana,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Circuit Court's new "Recreational Use Exclusion" restrict the public's right to use the navigable waters of America for recreational purposes under (i) the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution, (ii) the mandates of the "Equal Footing Doctrine" imposed upon all the states as a condition of admittance to the Union, (iii) federal common law, and (iv) the numerous Congressional enactments that declare recreational use of navigable waters of America to be both substantial interstate "commerce" under the Commerce Clause of the United States Constitution, and a legitimate use and activity permitted under the federal navigational servitude.

PARTIES TO THE PROCEEDINGS

The Petitioners in the proceedings are Normal Parm, Jr., Harold Eugene Watts, now deceased, herein represented by his widow, Ms. Glenda Watts, the duly appointed Administratrix of the Succession of Harold Eugene Watts, Fourth Judicial District Court, Parish of Morehouse, State of Louisiana, Roy Michael Gammill, William T. Rogers, and Robert Allen Balch. The Respondent is Mark W. Shumate, in his official capacity as Sheriff of East Carroll Parish, Louisiana.

The following persons or entities appeared as Amici in the District Court. The Amici in support of Petitioners were:

ROWA of Louisiana

Louisiana Crawfish Producers Association – West Inc.

Louisiana Wildlife Federation

Louisiana State Bass Federation

Waterways Access Association (of Louisiana)

Mississippi Bass Federation Nation

Arkansas State Bass Federation

Big Sun Bass Masters of Bellview Florida

Maple Bassmaster of Florida

Blackhawk Bassmasters of Illinois

PARTIES TO THE PROCEEDINGS – Continued

Bardstown Bassmasters of Kentucky

Kentucky State Bass Federation

Minnesota State Bass Federation

River Rats Bassmasters of Minnesota

Western Maine Anglers

Yankee Bassers Bass Club of Maine

Pennsylvania Bass Federation, Inc.

The Amici in support of Respondent were:

Walker Cottonwood Farms, LLC; and

Edward Wisner Donation

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued December 27, 2008.

OPINIONS BELOW

Originally, Magistrate Judge James Kirk was directed to make a report and recommendation to the District Court on the pending cross motions for summary judgment. The Magistrate Judge recommended judgment in favor of Petitioners in *Parm v. Shumate*, 2006 U.S. Dist. LEXIS 64080 (W.D. La. April 21, 2006); App. 50-95. The District Court granted judgment in favor of Respondent in *Parm v. Shumate*, 2006 U.S. Dist. LEXIS 61227 (W.D. La. Aug. 29, 2006); App. 23-40. Petitioners' motion for reconsideration was denied by the District Court in *Parm v. Shumate*, 2006 U.S. Dist. LEXIS 77506 (W.D. La. Oct. 11, 2006); App. 41-49.

Petitioners appealed the District Court's judgment to the United States Court of Appeals for the Fifth Circuit. The District Court's judgment was affirmed in *Parm v. Shumate*, 513 F.3d 135, 2007 U.S. App. LEXIS 29948 (5th Cir. La. 2007); App. 1-22, and Petitioners' motion for rehearing en banc was denied on January 28, 2008. App. 96.

STATEMENT OF JURISDICTION

On December 28, 2007, the United States Circuit Court of Appeals for the Fifth Circuit handed down its opinion in this matter, affirming the District Court's judgment. A timely petition for rehearing was denied on January 28, 2008.

This Court has jurisdiction to hear this appeal from the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY AUTHORITIES

Constitution of the United States, Fourteenth Amendment, Section 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . .

Constitution of the United States, Article I, Section 8, Clause 3:

> The Congress shall Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

United States Statute at Large, vol. 2, pp. 642 and 703 (1811):

> Provided, that it shall be taken as a condition upon which said State is incorporated in the Union, that the river Mississippi and the

navigable rivers and waters leading into the same and into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of said State, as to the inhabitants of other States and Territories of the United States, without any tax, duty, impost or toll therefor, imposed by said State, and the above condition and also all other conditions and terms contained in the third section of the Act the title whereof is hereinbefore recited shall be considered, deemed and taken, fundamental conditions and terms upon which the said State is incorporated in the Union.

Title 33 United States Code, Section 10:

All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways.

The Fish and Wildlife Act of 1956, Title 16 United States Code, Section 742a:

Declaration of policy. The Congress hereby declares that the fish, shellfish, and wildlife resources of the Nation make a material contribution to our national economy and food supply, as well as a material contribution to the health, recreation, and well-being of our citizens; . . . .

The Congress further declares that the provisions of this Act are necessary in order to accomplish the objective of proper resource development, and that this Act shall be administered with due regard to the inherent

right of every citizen and resident of the United States to engage in fishing for his own pleasure, enjoyment, and betterment, and with the intent of maintaining and increasing the public opportunities for recreational use of our fish and wildlife resources, and stimulating the development of a strong, prosperous, and thriving fishery and fish processing industry.

The Fish and Wildlife Coordination Act of 1985, Title 16, United States Code, Section 661:

For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development program, [the Secretary of the Interior is authorized to take certain coordinating actions in support of wildlife management].

The Magnuson-Stevenson Fisheries Management and Conservation Act of 1996, Title 16, United States Code, Section 1801:

(a) Findings.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas

are dependent upon fishing and related activities, ...

The Clean Water Act, Title 33, United States Code, Section 1251:

> **1251 Congressional declaration of goals and policies.**
>
> (a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act [33 U.S.C. 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 U.S.C. 1251 et seq.]:
>
> (2) It is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983; . . .

STATEMENT OF THE CASE

The Petitioners (also referred to as "Plaintiff-Fishermen") are all citizens and inhabitants of the United States who regularly utilize the navigable waters of the Mississippi River to boat and fish for pleasure and their personal consumption of the fish

and wildlife taken from the waters of the Mississippi River. The Plaintiff-Fishermen have been arrested for trespassing by the Respondent, the East Carroll Parish Sheriff, because they each have boated and fished in waters of the Mississippi River in East Carroll Parish.

It is undisputed that the Mississippi River is a navigable water body. App. 62.[1] The United States Geological Survey produced a topographical map of the disputed area, that was admitted into evidence. App. 123. It is undisputed that when the waters of the Mississippi River periodically rise and before reaching the federal high water mark, substantially all the riparian land inside the levee is inundated each year.[2] It is undisputed that some of the riparian land covered by the Mississippi River includes riparian land owned by Walker Lands, Inc. App. 44. Lastly, it is undisputed that the Plaintiff-Fishermen have used the waters of the Mississippi River that overlay the riparian bank for recreational boating and fishing, and that each has been arrested for doing so.[3]

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[1] "The parties do not dispute the navigability of the Mississippi River." App. 62.

[2] "The topographic map in evidence in this proceeding shows that the elevation in a few places on the lands is higher than 112 feet. At oral argument counsel for plaintiffs suggested, in answer to the court's inquiry, that approximately 95% of the lands are under water at the high water mark of 112 feet. That suggestion appears consistent with the topographic map." App. 57.

[3] "It is clear from plaintiffs' complaint and from their multiple briefs that plaintiffs seek to navigate on and to fish and

(Continued on following page)

This suit was initiated to stop the illegal arrest of the Plaintiff-Fishermen. The Plaintiff-Fishermen assert that multiple federal authorities preserve for the public the right to use the navigable waters of America for travel and recreational boating and fishing, across the surface of the navigable waters as those waters rise and spread across the riparian lands until the water reaches the federal high water mark.[4] In this case, the Magistrate Judge was instructed to make a report and recommendation to the District Court and recommended summary judgment in favor of Plaintiff-Fishermen. *Parm v. Shumate*, 2006 U.S. Dist. LEXIS 64080 (W.D. La. Apr. 21, 2006) App. 50-95. The District Court rejected these substantive legal recommendations, carving out a judicial exception to public navigation that holds that "recreational" use of navigable waters of America is unprotected by federal law and does not involve "commerce." App. 32-33. This "Recreational Use Exclusion" created by the District Court was the analytical basis

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hunt on waters between the ordinary low water mark and the ordinary high water mark of the Mississippi River. They do not seek authority to go upon dry land belonging to Walker Lands or others and do not seek to go upon waters which flood lands when the Mississippi rises above its ordinary high water mark of 112 feet." App. 58-59.

[4] "Plaintiffs argue that they have a federal right to fish on the Property when it is covered by the Mississippi River's waters because the Mississippi River is a navigable waterway of the United States. They contend that a federal navigational servitude burdens the Property, creating a public right to fish there." *Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2007). App. 14.

upon which the District Court granted summary judgment in favor of Respondent. App. 34. The United States Court of Appeals for the Fifth Circuit, adopted and affirmed the District Court's "Recreational Use Exclusion" to the public's rights of navigation and fishing in the waters of America, declaring that " . . . [n]either navigation nor commerce encompass recreational fishing." App. 16.

The Plaintiff-Fishermen asserted that the public's right to boat and fish the navigable waters of America has existed under common law since the American Constitution, and before in English common law. Equally, Petitioners submit that their right of navigation and piscary (fishing of public waters) has been recognized as a "privilege" protected by the Privileges or Immunities Clause of the Fourteenth Amendment to the Constitution; is a fundamental right of the public protected by Congressional mandate that same be preserved to the People as a condition of statehood; and further has been declared to be a proper use of navigable waters of America under the Commerce Clause.

Petitioners submit that each of these federal bodies of law cumulatively reserve to the public a basic right of travel, navigation and fishing in the navigable waters of America. Petitioners respectfully submit that the lower courts committed clear error in creating a "Recreational Use Exclusion" to these existing federal principles of law.

REASONS FOR GRANTING THE WRIT

A. The Circuit Court Decision Substantially Disregards Centuries-Old Federal Authority By Creating a "Recreational Use Exclusion" to the Public's Right to Travel on, Navigate and Fish the Navigable Waters of America.

Prior to the decision of the Circuit Court in this case, the legal principles establishing the legal right of the public to travel upon, navigate, fish and use the navigable waters of America were well-settled within four bodies of law: (i) the Privileges or Immunities Clause of the Fourteenth Amendment to the Constitution, (ii) the Congressional enactments known as the "Equal Footing Doctrine" which mandated that each state, as a condition of statehood, preserve to the public the use of its navigable waters forever, (iii) English common law carried into American common law, and (iv) Congressional enactments, and regulatory determinations by the Corps of Engineers, that confirm the public's right to recreationally navigate, boat, and fish under the federal navigational servitude and the Commerce Clause.

Notwithstanding these very substantial and settled bodies of law, which uniformly support public navigation for all reasonable purposes, the Circuit Court held that the public has no federally created right, nor any federally protected right, to travel on or use any of the navigable waters of America for recreational purposes. The Circuit Court's decision, for the

first time in American jurisprudence, creates a "Recreational Use Exclusion" to the public's general right of navigation on public waters.

The substantive, settled law that was disregarded includes the landmark decisions that have confirmed the public's right of travel, navigation and recreational use of public waters. The Circuit Court disregarded the landmark case known as *The Slaughterhouse Cases* (83 U.S. (16 Wall.) 36, 79-80 (1873)), in which this Supreme Court declared that the public's right to travel on and navigate the navigable waters of America is one of those "privileges" preserved by the Privileges or Immunities Clause of the Fourteenth Amendment to the Constitution. The Circuit equally ignored the landmark cases of *Arnold v. Mundy*, 6 N.J.L. 1 (New Jersey 1821) and *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842).

Secondly, the Circuit Court's decision disregards the Congressional mandate, known as the "Equal Footing Doctrine," directed to every state as a precondition of statehood, which required that the navigable waters within the state's border remain forever open to public navigation. More specifically the "Equal Footing Doctrine" requires that each state reserve the public use of the navigable waters for " *. . . the inhabitants of said State [and] to the inhabitants of the other States and Territories of the United*

States, ..."[5] See, also 33 U.S.C. 10. Again, the Circuit Court holds that its "Recreational Use Exclusion" supercedes these Congressional requirements for statehood.

Thirdly, the Circuit Court's reliance on its own "Recreational Use Exclusion" from public navigation disregards this Supreme Court's many holdings that expressly recognized under the common law, the public rights of navigation and piscary (fishing in navigable waters) in the navigable waters of America. Both *Martin v. Waddell's Lessee* (41 U.S. 367, 414 (1842)), and *Smith v. Maryland* (59 U.S. (18 How.) 71, 75 (1855)), reaffirm that the public's right to navigate includes a common " . . . *public right of fishery* . . . " in navigable waters. In *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900), this Court reaffirmed that the public's right to navigate and fish the navigable waters derives from the common law of navigation holding that "[t]he Common law recognizes navigation as an interest of paramount importance to the public."

Fourthly and finally, the Circuit Court's decision disregards the pre-eminent power and right of the Congress to determine those activities that are permitted within the federal navigational servitude. Numerous Congressional enactments specifically recognize recreational fishing and boating as a substantial commercial activity authorized by Congress to be conducted in the navigable waters of America.

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[5] United States Congressional Statute at Large, vol. 2, pp. 642 and 703 (1811).

These Congressional enactments include The Fish and Wildlife Act of 1956 (16 U.S.C. 742a-742j), The Fish and Wildlife Coordination Act of 1985 (16 U.S.C. 661-668); The Magnuson-Stevenson Fisheries Management and Conservation Act of 1996 (16 U.S.C. 1801 et seq.) and The Clean Water Act (33 U.S.C. 1251 et seq.) See, 3-5.

The Circuit Court's new "Recreational Use Exclusion" calls all these long established principles of federal navigation law into question, and eliminates all federal protection of recreational boating in America's waters. The Circuit Court's judgment, if left standing, will support the continuing shrinkage of the public's use of the federal navigational servitude, on a case by case basis, eliminating those activities that a court might now, or in the future, deem to be too "recreational" in nature. This potential for further disruption of recreational activities on America's waters is a threat of national scope. Such a national threat to well settled federal law strongly argues in favor of the granting of the petition for writ of certiorari.

B. The Circuit Court Holding Will Substantially Disrupt State Law on Public Navigation for Recreational Purposes.

The navigable laws of many of the states run parallel to established federal precedent, including the long established rights of public navigation and fishing. Should this new "Recreational Use Exception" to public navigation be left unreviewed, it will be necessary for many states to review the State's

laws on navigation, to determine if this new federal exclusion necessarily alters state navigational precedents protesting recreational use by the public under state law. Petitioners submit that the navigation laws of Louisiana, Michigan, Mississippi, North Carolina, Connecticut, Rhode Island, and Florida, to name a few, will be called into question if public navigation under federal law includes only direct commercial uses, and not recreational uses. See, state case law cited, *supra* 33-34.

Petitioners submit that this massive federal exclusion of public use will set in motion the contraction of public use under state law in reliance on the "Recreational Use Exclusion." This potential for national disruption and restructuring of public navigation law strongly supports the granting of the writ in this matter.

C. The Fishing Public and Supporting Businesses Recognize the Circuit Court's "Recreational Use Exception" to be a Substantial Economic Threat to Commerce Surrounding the Public's Recreational Use of the Navigable Waters of America.

Lastly, the boating and fishing public, and their supporting businesses, rightly recognize the holding of the Circuit Court as a substantial threat to commerce that supports recreational and personal use of navigable waters. The substantial economic devastation that the new "Recreational Use Exception" will inflict on American business cannot be overestimated or overstated.

Sixteen amici groups, from ten states submitted briefs to the lower courts in support of the public's right to recreational boating and fishing in the navigable waters of America. See, *District Court Ruling*, App. 24. Thereafter, in the Circuit Court, more than thirty-five amici groups, from more than twenty different states, moved to submit an amicus brief in favor of public navigation and fishing. These groups are from California, Florida, Maine, Pennsylvania, Minnesota, Utah and all points in between. These groups include statewide fishing groups and statewide conservation groups, who all support public use of navigable waters for recreational purposes. The unavoidable economic damage to be inflicted on the boating, fishing and marine commerce of America by excluding recreational uses, provides full justification if not a mandate under the rules of this Court, to carefully review the Circuit Court's extraordinary restriction on public access to navigable waters.

LEGAL ARGUMENTS THAT SUPPORT GRANTING THE WRIT

A. Facts of the Case.

The Plaintiff-Fishermen regularly boat and fish on the waters of the Mississippi River in East Carroll Parish, Louisiana. To say the least, the Mississippi River, in East Carroll Parish, provides to the American public the outdoorsman's dream: Big Water, Big Fish and the Big Outdoors. The many remnant

channels, river beds, shoots, inlets and estuaries have names such as Bunch's Cut-Off, Louisiana Bend, Old River, the Old Channel, Gassoway Lake, Little Gassoway Lake, Doe Lake, and Snag Lake. Other easily accessible and fishable inlets, swales and flats are periodically formed and destroyed by the raging river. But, during their existence, these waters are all regularly fished in, hunted on and used by the boating public. These changing components of the Mississippi River stretch more than five miles laterally (east and west) across the riverbed, from the western levee to the eastern levee, cumulatively resulting in the ever-changing water's edge of the Mississippi River in East Carroll Parish, Louisiana and Issaquena County, Mississippi.[6] See, USGS Map, App. 123.

The Petitioners and the public use every kind of water craft, from small aluminum skiffs to twenty or thirty foot modern fishing rigs equipped with sonar, live wells, GPS location devices, underwater imaging systems and the like, along with thousands of dollars of fishing gear and tackle. The waters fished by the

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[6] The natural forces of the River that arise each year as this River rises and falls thirty to fifty feet regularly moves the channels eastward or westward, scarring and gouging old and new waterways in the riparian lands each year. The mighty Mississippi River decides each year where its main channel will lay within a corridor between the levees that is approximately five miles wide. See, USGS Map, App. 123. See, *Walker Lands, Inc.*, App. 103-105.

Plaintiff-Fishermen vary in depths from five (5) feet to more than forty (40) feet, mostly outside the main channel where the shallower waters, and the bait fish, and the spring spawn all occurs.

There is no dispute that the Plaintiff-Fishermen are using waters at water levels between normal low and the normal high water mark in Louisiana, as these waters overlay the riparian land of the Mississippi River. The District Court confirmed that Plaintiff-Fishermen were over the riparian riverbed. App. 90.

Many of the geological and hydrological facts relied upon by the parties and the lower courts were detailed in a related State Court case, *Walker Lands, Inc. v. E. Carroll Parish Police Jury*.[7] *Walker Lands* determined the ownership of the riparian land inside the levee in Louisiana. Ownership had become unclear because of the ever changing location of the main channel of the Mississippi River in this riparian landscape since 1812. The state court determined that the normal low water mark in this area is 77 feet Mean Sea Level ("MSL"), and that the normal high water mark is 112 MSL. In other words, the state court found that the Mississippi River, in this area, naturally and regularly rises and falls on an annual

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[7] *Walker Lands, Inc. v. E. Carroll Parish Police Jury*, La. App. 38376, 871 So.2d 1258, 2004 La. App. LEXIS 977 (La. App. 2 Cir. Apr. 14, 2004); App. 101-122.

basis a full thirty-five (35) feet. This is many times deeper than the main navigational channel.[8]

The state court determined record ownership of the riparian bank under Louisiana law. However, the state court set aside all lower court decisions on the public navigational rights, affirmatively choosing to allow these issues to be resolved in this federal forum.[9] The State appellate court knew this Court had jurisdiction, and deferred these significant federal determinations to this federal forum.

B. Legal Bases of Petitioners' Action and Supporting Federal Rights.

Seldom are the legal rights presented to this Court first recognized in the *Magna Charta*. Seldom are the rights presented to this Court first recognized and protected as a specific requirement placed on every state in the Union as a precondition to its admission to the Union. Seldom are the rights recognized as one of those fundamental "privileges" specifically protected by the Privileges or Immunities Clause of the Fourteenth Amendment of the

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[8] The Corps of Engineers maintains a nine (9) foot deep main channel in the upper Mississippi River, and a thirty (30) foot deep main channel in the lower Mississippi River.

[9] The state court " . . . pretermit[s] discussion of the available use of these legal public servitudes during times of high water." App. 119.

Constitution. But, such is the unique legal heritage, and constitutional foundation of the right of public navigation and piscary (fishing) in the navigable waters of America. Few other rights have such a long and preeminent legal lineage.

Plaintiff-Fishermen submit that federal law preserves to the Petitioners, and the public, the right to navigate on and fish in the navigable waters of America, under:

1. The Privileges or Immunities Clause of the Fourteenth Amendment of the United States Constitution;

2. The "Equal Footing Doctrine" which mandates that navigable waters be forever free for public navigation as a condition of admittance to the Union;

3. Federal common law recognizing the public's right to reasonably use the navigable waters of America; and

4. Specific Congressional declarations that recreational use of navigable water comprises a proper use of the navigational servitude, and comprised substantial "commerce" under the Commerce Clause of the United States Constitution.

It is difficult to explain the reluctance of the lower Circuit Court to adequately consider the time-honored jurisprudence of this Supreme Court that

have declared that the public's right of navigation and piscary to be a settled, centuries-old right. It appears that the Circuit Court's legal error resulted from its singular focus on the "recreational" nature of the Petitioners' activities as distinguished from "commercial" activities. This limited analysis caused the Circuit Court to create a new, simplistic "Recreational Use Exclusion" to the public's right of navigation.

The Circuit Court totally rejected all arguments that recreational navigation is protected anywhere on navigable waters. Instead, the Circuit Court held that "recreational" fishing was not "commerce" or "commercial navigation" and thus was not an activity contemplated or authorized by federal navigation law.[10] Based on this novel "commerce v. recreation"

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[10] "As implied by its very name and the constitutional provision from which it arises, the federal navigational servitude is concerned with *navigational* rights and *commerce*. See *United States v. Montana*, 450 U.S. 544, 551 (1981) ('The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce.'); *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979) ('The navigational servitude . . . gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce.'); . . . . **Neither navigation nor commerce encompass recreational fishing.**"

(emphasis added) App. 16.

analytical dichotomy, the Circuit Court simply held "commercial" use of the navigable waters is the only legitimate authorized use of navigable waters, and thus "recreational" use of navigable waters was unauthorized under federal law.

This newly articulated "Recreational Use Exclusion" to public navigation eliminates federal assurance of recreational travel, navigation, boating or fishing in the navigable waters of America. The Circuit Court held it to be an issue for the state to determine whether recreational travel, navigation, boating or fishing would be permitted on navigable waters within its jurisdiction.

With respect to the Circuit Court, Plaintiff-Fishermen submit that the right of navigation, and the permitted uses of navigable waters by the public has always been guaranteed by federal authorities, and that recreational navigation in today's America is as "commercial" as towing a barge, under the federal navigational servitude.

1. The Right of the Public to Navigate and Fish Navigable Waters Is a National Privilege Protected by the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution.

Petitioners submit that never before, in two hundred years of American jurisprudence has a federal court held that the public's right to use the

navigable waters of America for travel, boating or fishing was limited to direct commercial use and excluded public recreational use. Until this opinion, the People of America had the unquestioned privilege of travel, navigation and fishing on the navigable waters of America. Hereafter, the Circuit Court's holding requires the public to stop and explain their purpose on the navigable waters to determine if travel or navigation is permitted.

The Circuit Court's opinion that recreational fishing is unprotected by federal law stands alone and in direct conflict with this Supreme Court's long established jurisprudence on the issue. In 1842, in *Martin v. Waddell's Lessee* (41 U.S. 367, 414 (1842)), this United States Supreme Court expressly recognized a then one hundred fifty year old right of all citizens to exercise the rights of navigation and piscary (fishing) in the navigable waters of America. This Court laid out the public right's legal history explaining that this common right had previously been recognized under English law beginning with the signing of *The Magna Charta*,[11] and continuing in

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[11] "But from the opinions expressed by the justices of the Court of King's Bench, in the case of *Blundall v. Catterall*, 5 Barn. and Ald. 287, 294, 304, 309; and in the case of *The Duke of Somersett v. Fogwell*, 5 Barn. and Cress. 883, 884, the question [of whether the King had granted private property rights in navigable waters and the rights of piscary therein] must be regarded as settled in England against the right of the king since *Magna Charta* to make such a grant." *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842).

effect thereafter into American common law under the United States as the revolutionary governmental successor of England. The seminal case on public navigation and fishing rights was handed down only thirty-five years after the adoption of the Constitution, *Arnold v. Mundy*, 6 N.J.L. 1, 24-25 (1821), which was followed by this Court in *Martin*.

In the *Martin* case, this Supreme Court emphasized the fundamental legal sanctity of the public's right to navigate and fish the navigable waters of America, declaring that " . . . *the public and common right of fishery in navigable waters, . . . has been so long and so carefully guarded in England, and . . . preserved in every other colony founded on the Atlantic borders, ...*" *Martin v. Waddell's Lessee*, 41 U.S. 367, 414 (1842). Following this rational, this Supreme Court confirmed the interrelationship of travel, navigation and fishery in *Morris v. U.S.*, 174 U.S. 196 (1899), declaring

> "The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above highwater mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, . . . " *Morris*, 174 U.S. at 237.

Following *Waddell*, in 1855, this Supreme Court, in *Smith v. Maryland*, reaffirmed that the right to utilize the navigable waters of America and to fish therein, was a common " . . . *public right of fishery* . . . " to be held in trust and protected by the state government. *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855). This Court has repeatedly affirmed that the People hold the common rights of use and ownership of the navigable waters and the right to use the abundance of the fishery therein, and that title shifts to each state only in binding trust for the People's own common enjoyment and benefit.

Ultimately, in 1873, following the adoption of the Fourteenth Amendment, this Supreme Court affirmatively held that the People's common right of navigation and fishing was one of the "privileges" held by the People, and preserved under the Privileges or Immunities Clause of the Fourteenth Amendment.[12] In *The Slaughterhouse Cases*, this Court declared that "[t]he right to use the navigable waters of the United States, however they may penetrate the territory of the several States, . . . , are dependent upon citizenship of the United States, and not citizenship of a State." *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1873). In *Baldwin v. Fish & Game Commission,* 436 U.S. 371 (1978), this Court reaffirmed the constitutional protection granted to

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[12] *Constitution of the United States of America, Fourteenth Amendment, Privileges or Immunities Clause.*

public navigation, as enumerated in *The Slaughterhouse Cases*, confirming the continuing accuracy of the privileges enunciated in *The Slaughterhouse Cases*, including the common right of travel, navigation and fishing. Since that affirmation, no other jurisprudence nor legislative act has altered or diminished the constitutional "privilege" preserved for the People to navigate and fish the navigable waters of America.

With due respect to the Circuit Court, the Circuit Court's reliance on the novel "Recreational Use Exclusion," is in conflict with the "Privileges or Immunities Clause" as recognized by this Court's settled holdings on the subject. The public's right to navigate and fish navigable waters is a right older than the Constitution, and its unexplained destruction by the Circuit Court is done without authority. Petitioners pray that the writ be granted to review this extraordinary holding.

2. The Right of Public Navigation and Fishing Is a National Right Affirmed by the "Equal Footing Doctrine" Mandates Placed Upon Each State as a Condition of Admittance to the Union.

As new states were admitted into the Union, all the navigable waters of America were transferred to the respective states, to be held for the common use of the public. This funda nental preservation of the rights of the public in their navigable and tide waters held in common ownership and for common use was

accomplished through Congressional legislation implementing the legal principle known as the "Equal Footing Doctrine." An "Equal Footing Doctrine" statute was passed by Congress as a precursor to the admittance of each new state. For example, preceding the admission of the State of Louisiana into the Union in 1812, Congress declared:

> " . . . that it shall be taken as a condition upon which said State [of Louisiana] is incorporated in the Union, ***that the river Mississippi and the navigable rivers and waters leading into the same*** and into the Gulf of Mexico, ***shall be common highways, and forever free, as well to the inhabitants of said State as to the inhabitants of other States and Territories of the United States, without any tax, duty, impost or toll therefor***, ..." United States Congressional Statute at Large, vol. 2, pp. 642 and 703 (1811).

See, *Boykin & Lang v. Shaffer*, 13 La Ann 129 (1858).

The legal effect of the "Equal Footing Doctrine" has been the continuing Congressional assurance that the People of America are granted a uniform and equal right of public navigation and fishing in all the navigable waters of America. The premiere constitutional importance of this public right is obvious, when one considers the fact that Congress declared that the preservation of public navigation and fishing was a pre-condition imposed on each state to be met before a territory could become a state.

Notwithstanding the fact that the "Equal Footing Doctrine" is preserved using language that speaks of maintaining the navigable waters as " . . . common highways . . . ," this Supreme Court long ago recognized that the public right of navigation on these "public highways" has consistently included the right to fish these navigable waters. In the landmark decisions of *Shively v. Bowlby* (152 U.S. 1, 57 (1894)) and *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842), this Supreme Court recognized that use of navigable waters was " . . . to be freely used by all for navigation and fishery, as well for shell fish as floating fish." *Shively*, 152 U.S. at 16, quoting *Martin v. Waddell's Lessee*.

Stated simply, this Court has long recognized that "fishing" is a component part of the right of "navigation" in America. This settled principle of navigation law was disregarded by the Circuit Court without explanation. Had the Circuit Court properly recognized that "fishing" is a component of "navigation," the Circuit Court would have held that the Petitioners' navigation to fish was protected in the Mississippi River across the surface of the navigable waters up to the high water mark. The Circuit Court left unexplained the legal basis that caused it to create a "Recreational Use Exclusion" to limit these centuries-old rights of navigation and piscary in America.

Another important corollary of the "Equal Footing Doctrine" mandate of Congress, was disregarded by the Circuit Court. The pre-eminent right of public navigation under the "Equal Footing Doctrine"

necessarily preserved to the People the right to navigate and fish the waters of America up to normal high water, as they rise over, and recede from the riparian bank of a navigable water body. Having excluded "fishing" and "recreational fishing" from the concept of navigation, the Circuit Court granted ownership and control of the navigable waters of America to the riparian landowners along the navigable waterbody. This holding is in direct conflict with the principles of public navigation law that have recognized the superiority of the right of public use of navigable waters, over and above the subordinate rights of a riparian landowner. In 1913, this Court affirmed that "[o]wnership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913). Affirmed: *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). Likewise, the Fifth Circuit Court previously followed *Chandler-Dunbar* and reaffirmed that "[t]his navigational servitude is an extremely old concept – owners of property or property rights within navigable waters take those rights fully cognizant of their limited nature. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950); *Gibson v. United States*, 166 U.S. 269 (1897)." *Coastal Petroleum Co. v. United States*, 524 F.2d 1206, 1209 (5th Cir. 1975). Equally, the Corps of Engineers, consistent with these many court holdings, has also affirmed that any rights held by a riparian owner is a subordinate interest to the right of the public to navigate and fish navigable waters, declaring that:

> "Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody." 33 C.F.R. 329.11(a). App. 99.

Chandler-Dunbar, *Kansas City Life Ins.*, *Gibson*, *Coastal Petroleum* and the authoritative regulations of the Corps of Engineers[13] all confirm that the public's right of navigation and use of navigable waters in America in those waters overlaying the riparian riverbed, is a prior, superior legal right to any right of riparian ownership.

Nonetheless these multiple authorities, all issued more than one hundred years ago, were disregarded, and for the first time, the Circuit Court held that the "Recreational Use Exclusion" eliminates recreational use of navigable waters as a permitted activity in navigable waters. Following its erroneous logic, the Circuit Court held that the riparian owner has ownership and control of the navigable waters overlaying the riparian riverbed.

This extraordinary limitation on public navigation must be reviewed. To deny this petition, allows

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[13] "This regulation . . . prescribes the policy, practice and procedure to be used . . . in answering inquiries concerning navigable waters of the United States." 33 C.F.R. 329.1. App. 98.

the Circuit Court's "Recreational Use Exclusion" to public navigation to stand disregarding the "Equal Footing Doctrine" mandate of public use imposed on every state. The conflict between the Circuit Court's judicial "Recreational Use Exclusion" and the Congressional "Equal Footing Doctrine" requires that this petition be granted.

3. The Right of Public Navigation and Fishing Is a National Right Recognized Under Federal Common Law.

The Circuit Court held that the Petitioners' ". . . argument . . . based upon purported federal common law is unavailing," choosing to limit any common law rights of navigation to "commerce" and thereby excluding "recreational use" from permitted navigation. *Parm v. Shumate*, 513 F.3d 135, 144, n.5 (5th Cir. 2007); App. 18.

First, the holding in this case is in direct conflict with the Fifth Circuit Court's prior holding in *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356, 359 (5th Cir. 1931), which recognized that

> "[t]he public right of navigation entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as for carrying persons or property gratuitously or for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common."

In this case, the Circuit Court unilaterally and affirmatively chose to overturn its own previous holding in *Silver Springs*, and hereafter limit public navigation to commercial navigation, such as paid tourist cruising as was involved in *Silver Springs*. The Circuit Court reversed itself without explanation, and in conflict with numerous holdings of this Supreme Court, and other courts of America.

It is clear that the *Silver Springs* holding, as originally issued, is consistent with this Supreme Court's holdings in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, 436 (1892) and *U.S. v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913), holding that navigation is a general public right of multiple uses. In each of these cases cited above, this Supreme Court acknowledges the common right of ownership and use reserved to the public, and the broad, flexible activities included in a wide variety of "navigation" that occurs by the public.

More directly, this Supreme Court held in 1894, in the case of *Lawton v. Steele*, 152 U.S. 133, 139 (1894), that "[a]t common law the right of fishing in navigable waters was common to all." As this Court knows, the right of public navigation first arose in the common law of England, and was preserved into American common law. Equally, the common law of navigable waters of America has recognized and protected the public's rights of common navigation and fishing as a substantially inalienable right of the People. This Supreme Court has long ago confirmed that "[t]he Common law recognizes navigation as an

interest of paramount importance to the public" (*Scranton v. Wheeler*, 179 U.S. 141, 163 (1900)) and that any title to the riparian land " . . . is a qualified title, a bare technical title, . . . held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation" (*Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979)). The uniformity of these common law principles is obvious when one reviews the navigable water cases that evolved in America, based upon the public importance of navigation, fishing, and hunting to settle the American continent. Conversely, never before has a "Recreational Use Exclusion" been articulated by an American court.

The common law of public navigation is fundamentally federal in nature, priority and Congressional mandate. The public has the pre-eminent right to use navigable waters. The Fifth Circuit Court, in *Silver Springs*, consistent with the many other court rulings, affirmed the riparian owners " . . . cannot, any more than can one who has no title to riparian or submerged land, acquire an exclusive right to use navigable water opposite his upland for travel or navigation for purposes of business or of pleasure or diversion." *Silver Springs*, 50 F.2d 356, 359 (5th Cir. 1931). This holding, based in common law, is specifically based upon the Florida Supreme Court's determination in 1911, in *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 558-559, 57 So. 428 (1911), that the common law of America, recognizes the public's

superior right of navigation and fishing in navigable waters. Further, the Florida Supreme Court found that the public's common law right of navigation was preserved and affirmed by the "Equal Footing Doctrine." The culmination of this legal logic sequence is the recognition that the common law right of public navigation and piscary was preserved to the People through the uniform mandates of public navigation in the "Equal Footing Doctrine." The riparian owners have no effect on public navigational rights reserved to the People and the federal government.[14]

To be clear, a single exception to the pre-eminent right of public use has been recognized in the federal common law jurisprudence. This exception allows a state to alienate or limit the public's common right of navigation and fishing but only " . . . *when that [limitation] can be done without substantial impairment of the interest of the public in the waters*, ... (Emphasis added)" *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, 436 (1892). Clearly, the "Recreational Use Exclusion" cannot logically "enhance" public navigation by denying to the American people their right of access and use of navigable waters.[15] Further, the

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[14] The Corps of Engineers existing regulations equally direct that the ownership rights of riparian landowners, or high land owners, is irrelevant to the public's right of use of navigation waters. 33 C.F.R. 329.11(a)(2), App. 99-100.

[15] Louisiana preserves in the Louisiana Constitution, Article I, the inalienable rights of its People, which includes the *"[t]he freedom to hunt, fish, and trap wildlife, including all aquatic life, traditionally taken by hunters, trappers and anglers, is a*

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Circuit Court did not suggest that this "Recreational Use Exclusion" was derived from any particular act of government, state[16] or federal.

Another significant legal problem arises if the Circuit Court's holding that there is no federal right of public navigation is affirmed. Many states have formulated their navigation law with the understanding that these four bodies of federal law preserved the public's right to recreational use as federal mandates on the states. With the declaration of a "Recreational Use Exclusion," any state that has held that its rights are based in, or are compelled by, federal navigational rights including "recreational" use, have lost the federal justification for "recreational" use. Reliance on numerous states, have assumed the federal nature of the People's common right of navigation and piscary, including **Louisiana**[17] (*State v. Barras,* 615 So.2d

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valued natural heritage that shall be forever preserved for the people." Louisiana Constitution, Article I, Section 27.

[16] Louisiana jurisprudence fully concurs with the inalienable nature of the public's use of navigable waters. *Gulf Oil Corp. v. State Mineral Bd.*, 317 So.2d 576, 1974 La. LEXIS 4480 (La. 1974); See, *O'Brien v. State Mineral Board*, 209 La. 266, 24 So.2d 470, 1945 La. LEXIS 933, 1946 La. LEXIS 697 (1945); *LSA-R.S. 9:1107*; *NOTE: Property – Susceptibility of Beds of Navigable Waters to Private Ownership*, Stephen H. Kupperman; 50 Tul. L. Rev. 193 (1975).

[17] In the Circuit Court opinion, Louisiana's bank servitude provided in Louisiana Civil Code Article 456 provides that "[t]he banks of navigable rivers or streams are private things that are subject to public use" has been applied to ONLY allow use of the navigable waters overlaying the bank only " . . . for navigational

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285, 288 (La. 1993); **Michigan** (*Glass v. Goeckel*, 473 Mich. 667, 703 N.W.2d 58, 64, 2005 Mich. LEXIS 1314 (2005)); **Mississippi** (*Ryals v. Pigott*, 580 So.2d 1140, 1147, 1990 Miss. LEXIS 694 (Miss. 1990)); **North Carolina** (*Gwathmey v. State ex. rel. Department of Environment, Health & Natural Resources*, 342 N.C. 287, 464 S.E.2d 674, 1995 N.C. LEXIS 678 (1995)); **Connecticut** (*Delinks v. McGowan*, 148 Conn. 614, 620, 173 A.2d 488, 491 (1961)); **Rhode Island** (*City of Providence v. Comstock*, 27 R.I. 537, 65 A. 307 (1906)); and **Florida** (*Thiesen v. Gulf, F. & A. Ry. Co.*, 75 Fla. 28, 58; 78 So. 491, 501 (1917) and *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 558-559, 57 So. 428 (1911)).[18]

As this list of state cases illustrates, much of the state law on navigability is premised on a "federal" foundation, based in English (now federal) common law of public navigability and the "Equal Footing Doctrine" mandates of statehood, that cumulatively protect the public's right to navigate and fish the

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purposes." *Walker*, at App. 119, n.16; *Parm*, at App. 2-21. Therefore, like these other states, Louisiana has applied its law assuming that under federal law "navigation" is limited to commercial uses, and excludes recreational uses. This is a perfect illustration of the disruption of state navigational law that will occur if the federal navigational rights are limited to "commercial" use alone.

[18] Also see *COMMENT: Floating On Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West*; Ravis H. Burns; 5 Wyo. L. Rev. 561 (2005), University of Wyoming.

navigable waters of America. It is imperative that this Court recognize that the holding of the Circuit Court, and in particular this national "Recreational Use Exclusion," significantly reduces the public's right to use navigable waters under federal law, and that it equally destroys the federal law foundation relied upon by many of the states.

The long established principles of public navigation articulated by this Supreme Court, and the Supreme courts of many of the other states, all confirm that there exists a fundamental federal common law that recognizes and protects the rights of the public to travel in, navigate on and fish in the navigable waters of America. The conflict between the established common law concerning navigable waters and the Circuit Court's holding is national in ramification, and compels the overturning of long. established principles of governmental rights, state and federal. This sudden deviation from established precedent argues strongly that this writ of certiorari should be granted.

4. The Right of Public Navigation and Fishing Is a Congressionally Recognized Public Use of Navigable Waters Under the Federal Navigational Servitude and Under the Commerce Clause.

As noted earlier, the Circuit Court focused its analysis on a simplistic dichotomy between "recreational" and "commercial" use of navigable waters by

the public, based upon the "Commerce Clause"[19] foundation for the federal navigational servitude.[20] The Circuit Court started with the proposition that in determining whether federal law created a power or right, " . . . it is for Congress to decide whether latent federal power should be exercised to displace state law." *Parm v. Shumate,* 513 F.3d 135, 144 (5th Cir. 2007), citing *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). App. 18. The recognition of the superior right of Congress to determine the use of navigable waters is a long established and recognized legal standard articulated by this Court as well.[21]

The lower Circuit Court properly recognized that this federal navigational servitude is the " . . . dominant servitude over navigable waters of the United States." *Parm v. Shumate,* 513 F.3d 135, 142 (5th Cir. 2007); App. 14-15. Further, and more importantly in light of the lower court's legal errors, the Circuit Court rightly recognized that once a waterway is

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[19] *Constitution of the United States, Article I, Section 8, Clause 3.*

[20] The Circuit Court addressed this question thus: "As implied by its very name and the constitutional provision from which it arises, the federal navigational servitude is concerned with navigational rights and commerce." App. 16.

[21] In 1940, in *United States v. Appalachian Power Co.*, this Court affirmed that Congress has the constitutional power to determine what is "commerce," that " . . . navigable waters are subject to national planning and control in the broad regulation of commerce granted to the Federal Government." *United States v. Appalachian Power Co.*, 61 S. Ct. 291, 308 (1940).

determined to be navigable under law, the navigable nature of that navigable waterway " . . . extends laterally to the entire water surface and bed of a navigable waterway, which includes all the land and waters below the ordinary high water mark." 33 C.F.R. 329.11(a). App. 99. *Parm v. Shumate,* 513 F.3d 135, 143 (5th Cir. 2007); App. 15. Conforming to these established divisions of public right and private ownership, the Corps of Engineers further established by regulation that "[a] determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity." 33 C.F.R. 329.4. App. 98.

However, the Circuit Court then unexpectedly erred by enunciating the "Recreational Use Exclusion" to the public's right of navigation and fishing. Unfortunately, the Circuit Court ignored the holding of this Court in *Phillips Petroleum Company v. Mississippi*, which recognized that the federal interests in navigable waters extend well beyond "commercial" use, and includes flood control, public use and other governmental interests. *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469 (1988). In *Phillips Petroleum Company*, this Supreme Court reaffirmed that it " . . . reject[s] the dissent's assertion that 'the fundamental purpose of the public trust [navigable waters and trust lands] is to protect commerce. . . .'" *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 476 (1988). Therefore, the nature of the activities encompassed by navigation clearly goes beyond limited commercial activities.

Further, had the Circuit Court reviewed the body of Congressional mandates involving recreational boating and fishing on navigable waters, the Circuit Court would have found numerous Congressional enactments that recognize both the commercial substantiality[22] of "recreational" boating and fishing in America, and the affirmative recognition by Congress that "recreational uses" are legitimate uses of the navigable waters of America. See, The Fish and Wildlife Coordination Act of 1985 (16 U.S.C. 661-668); The Fish and Wildlife Act of 1956 (16 U.S.C. 742a-742j); The Magnuson-Stevenson Fisheries Management and Conservation Act of 1996 (16 U.S.C. 1801 et seq.); and The Clean Water Act (33 U.S.C. 1251 et seq.). See, 3-5.

Again, the Circuit Court should have deferred to the power of Congress under the Commerce Clause, as "[s]o unfettered . . . over the navigable streams of the country that its judgment . . . is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control." *U.S. v. Chandler-Dunbar Co.*, 229 U.S. 53, 64 (1913). Congress has the plenary authority to decide the width of navigable waters. *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 264

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[22] For the economic impact of fishing and boating in Louisiana, see, Website for Louisiana Department of Wildlife and Fisheries; Education/Research; Economic Impact. Study Accessible under website of Louisiana Department of Wildlife and Fisheries (http://www.wlf.louisiana.gov/pdfs/education/Economic%20Benefits%20of%20FishWLBoatingResources2003.pdf, p. iv)

(1915). The Circuit Court should have deferred to the Congressional delegation of authority to the Corps of Engineers and their regulatory directives. Pursuant to that delegation, the Corps of Engineers has determined that the federal navigational servitudes " . . . includes all the land and waters below the ordinary high water mark." 33 C.F.R. 329.11. App. 99.

It is not the prerogative of the Circuit Court to replace Congressional mandates and enactments with a judicial "Recreational Use Exclusion" inconsistent with Congressional enactments approving recreational use of navigable waters under the Commerce powers.

Again, the holding of the Circuit Court, standing in conflict with the declarations of Congress, strongly calls for this Court to grant the petition for writ of certiorari herein.

CONCLUSION

Plaintiff-Fishermen respectfully submit that the new "Recreational Use Exclusion" from public navigation is fundamentally at odds with the long-standing authorities that create and protect the public's right to recreationally use navigable waters of America, and this fundamental conflict – denying basic navigational rights to the American public – compels this Honorable Court to grant the writ of certiorari to fully review the judgment and holding of the Circuit Court below.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-31045

NORMAL PARM, JR.; HAROLD EUGENE WATTS; ROY MICHAEL GAMMILL; WILLIAM T. ROGERS; ROBERT ALLEN BALCH

Plaintiffs-Appellants

v.

MARK SHUMATE, in his official capacity as Sheriff of East Carroll Parish

Defendant-Appellee

Appeals from the United States District Court for the Western District of Louisiana

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(Filed Dec. 28, 2007)

Before KING, GARZA and BENAVIDES, Circuit Judges.

KING, Circuit Judge:

Plaintiffs-appellants Normal Parm, Jr., Harold Eugene Watts, Roy Michael Gammill, William T. Rogers, and Robert Allen Balch ("Plaintiffs"), recreational fishermen, appeal the district court's denial of their summary judgment motion and the grant of the

cross-motion for summary judgment by defendant-appellee East Carroll Parish Sheriff Mark Shumate ("Sheriff Shumate"). Plaintiffs brought their claims against Sheriff Shumate under 42 U.S.C. § 1983, alleging that they were falsely arrested for trespass when they refused to cease fishing on waters covering ordinarily dry, private property (the "Property") owned by Walker Cottonwood Farms, L.L.C., successor-in-title to Walker Lands, Inc. (collectively "Walker"). Plaintiffs argue that Sheriff Shumate lacked probable cause to arrest them for fishing on the Property because the public has a federal and state right to fish on the Property when it is submerged under the Mississippi River. Because we disagree, we AFFIRM the district court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

The underlying dispute in this case began over a decade ago, and the facts have been considered in various forms by multiple courts, including this one. Plaintiffs are lifelong boaters, hunters, and fisherman who fish on the Mississippi River in East Carroll Parish and other river parishes in northeast Louisiana. The water levels of the Mississippi River fluctuate seasonally. In East Carroll Parish, the normal low water mark is seventy-seven feet above mean sea level. Yet during the spring season the river floods well beyond its normal channel – as a result of increased rainfall and snow melt in the North – and the river regularly rises to as high as one hundred and

twelve feet above mean sea level. It is normal for the river to remain at this level for at least two months.

The Property is located in East Carroll Parish. On its eastern side, the Property is bound by the Mississippi River, and on its western side, it is bound by the Mississippi River's levees. Buildings, crop lands and forests, with trees as tall as one hundred and forty feet, are located on the Property. In addition, waterways known as Gassoway Lake, Little Gassoway Lake, and other bodies of water are contained within its boundaries. Gassoway Lake, which Plaintiffs consider the most ideal venue for fishing on the Property, is located on the Property's western side, nearly three-and-a-half miles from the ordinary low water mark of the Mississippi River and its channel. Gassoway Lake is connected by a man-made drainage ditch to Bunch's Cutoff, which, in turn, flows into the Mississippi River. When the river floods in the spring, Gassoway Lake, along with the rest of the Property, is submerged under its waters.

Plaintiffs have fished the waters of Gassoway Lake when it was flooded by the Mississippi River, even though they knew that Walker objected to their presence. In 1996, Walker began filing complaints with Sheriff Shumate against boaters fishing on Gassoway Lake. Sheriff Shumate responded by arresting Plaintiffs, and others found on the Property,

for trespass.[1] While admitting that they did not have Walker's permission, Plaintiffs claimed that they were entitled to fish on the Property when it was flooded because Gassoway Lake was either: (1) owned by the State of Louisiana on behalf of the public; or (2) subject to state and federal servitudes.

The Attorney General for the State of Louisiana agreed with Plaintiffs' position and issued Louisiana Attorney General Opinion No. 96-206, concluding that channels of the Mississippi River traversed the Property and were "river bed" owned by the State. His opinion stated that "Lake Gassoway is a naturally navigable body of water under both State and Federal law and actually supports navigation for such purposes as hunting, fishing, [and] trapping. . . . " He also determined that the Property was subject to a public servitude. Notwithstanding this opinion, Sheriff Shumate continued to arrest fishermen found on the Property. However, the East Carroll Parish District Attorney, James "Buddy" Caldwell, informed Sheriff Shumate that he did not intend to prosecute any of the Plaintiffs for trespass until the ownership and public servitude issues were resolved. To this day, Plaintiffs have not been prosecuted.

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[1] Specifically, they were arrested for violating LA. REV. STAT. ANN. § 14:63(B), which states: "No person shall enter upon immovable property owned by another without express, legal, or implied authorization."

On June 10, 1996, Walker filed suit in Louisiana state court against the East Carroll Police Jury, seeking a declaration that it owned the Property and an injunction prohibiting members of the public from entering without permission. *Walker Lands, Inc. v. Louisiana,* No. 17,746, slip op. at 1-2 (La. 6th Dist. Ct., May 1, 2003). The state trial court issued a temporary restraining order prohibiting the Police Jury, and all other persons or government agencies, from entering Gassoway Lake without permission for any purpose, including boating, fishing, or hunting. *Id.* at 2. The Police Jury filed a third-party demand against the State of Louisiana. The State was added as an indispensable party, and the Police Jury was eventually dismissed. *Id.* On March 16, 1998, the court granted Walker's motion for summary judgment and issued a permanent injunction. *Id.* The State appealed to the Second Circuit Court of Appeal of Louisiana, which reversed, holding that the issues could not be resolved on summary judgment. *Id.*; *Walker Lands, Inc. v. East Carroll Parish Police Jury,* No. 31,490, slip op. at 5 (La. Ct. App., March 5, 1999).

On December 17, 2001, with the state trial court yet to issue a final decision, Plaintiffs filed this case in federal district court. Plaintiffs alleged that Sheriff Shumate lacked probable cause to arrest them in light of the opinion of the State Attorney General and the decision of the Second Circuit Court of Appeal. They claimed that:

> Until there is rendered a final judgment in the litigation pending in the Sixth District

> Court between [Walker] and the State of Louisiana, there is not sufficient legal evidence to prove, beyond a reasonable doubt, that the use of the naturally and regularly navigable waters of the Mississippi River, including those navigable waters that include Gassoway Lake, Little Gassoway, the old channel and Bunch's Cut-Off, results in a criminal trespass of the land of [Walker,] so long as the Plaintiffs utilize naturally occurring, navigable waters of the Mississippi River.

Plaintiffs sought damages for false arrest under 42 U.S.C. § 1983 and an injunction prohibiting further arrests for fishing on the Property until a "final judgment is rendered by a court of competent jurisdiction, specifying the ownership and navigational rights of the State of Louisiana and [Walker] relative to the [Property] . . . during normal water heights. . . ."

On June 4, 2002, Plaintiffs filed a motion for summary judgment, and on July 8, 2002, Sheriff Shumate filed a cross-motion for summary judgment or, in the alternative, a motion to stay the case pending resolution of the state court proceedings. Both motions were referred to a magistrate judge for a report and recommendation. Because there was a "reasonable probability that the state courts [might] find the waters at issue to be navigable and thus public," the magistrate judge held that a federal decision in this case could be obviated by the state proceeding. The district court adopted the report and

recommendation, stayed the federal case, and Plaintiffs appealed. In an unpublished decision, we agreed that the questions of Louisiana law, then pending in a Louisiana court, might "render it unnecessary for federal courts to decide the constitutional issues presented in this case[,]" and affirmed the district court's stay. *Parm v. Shumate,* No. 02-31183, slip op. at 6 (5th Cir. June 16, 2003).

On May 1, 2003, the state trial court ruled that Walker owned the Property and had the right to exclude the public from it. *Walker Lands,* No. 17,746, slip op. at 1; *see also Walker Lands, Inc. v. East Carroll Parish Police Jury,* 871 So.2d 1258, 1261 (La. Ct. App. 2004). The court first noted that it was undisputed that the Property was either woodland or farmland in 1812, the year that Louisiana was admitted to the Union as a State.[2] *Walker Lands,* No. 17,746, slip. op. at 1; *Walker Lands,* 871 So.2d at 1261. It found that during the 1860s and 1870s, the Mississippi River slowly but gradually shifted westward and submerged the Property. *Walker Lands,* No. 17,746, slip op. at 1; *Walker Lands,* 871 So.2d at 1261. When the river subsequently shifted back eastward, it left behind a swale – a shallow depression in the land – which became Gassoway Lake through alluvion or

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[2] Bodies of water formed before 1812 are owned by the State. *See Dardar v. Lafourche Realty Co., Inc.*, 985 F.2d 824, 826-27 (5th Cir. 1993).

accretion.[3] *Walker Lands,* No. 17,746, slip op. at 11-12; *Walker Lands,* 871 So.2d at 1261. Gassoway Lake and the other natural bodies of water on the Property were formed before 1910, when private landowners purchased it. *Walker Lands,* No. 17,746, slip op. at 11; *Walker Lands,* 871 So.2d at 1261. Moreover, the court determined that none of the waters on the Property were navigable. But for the man-made drainage ditch connected to Bunch's Cutoff and other structures, the court held, Gassoway Lake itself would be non-existent during the summer months. *Walker Lands,* No. 17,746, slip op. at 12-13. Since the waters lying on the Property were not navigable in fact, the trial court entered a permanent injunction prohibiting the public-at-large from going on Gassoway Lake, or on the land between Gassoway Lake and the Mississippi River. *Walker Lands,* No. 17,746, slip op. at 12-14; *Walker Lands,* 871 So.2d at 1262-63.

The State appealed the trial court's decision to the Second Circuit Court of Appeal, which affirmed in part and reversed in part. *Walker Lands,* 871 So.2d at 1268-69. The appellate court accepted the trial court's findings of fact and held that the Property was privately owned. The court rejected the State's argument

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[3] Alluvion and accretion are used synonymously to describe the addition of soil by gradual deposit. *Walker Lands,* 871 So.2d at 1264 n.13. Under Louisiana law, "[a]ny alluvion . . . which forms along the banks of a river belongs to the riparian landowners who own the land adjacent to the river, when the river shifts course." *Id.* at 1264 (citations omitted).

that the Property was the bed of the Mississippi River – and therefore owned by the State – because a river's bed consists only of the land lying below the river's ordinary low water mark. *Id.* at 1262 n.7. It did not matter that the Mississippi River sometimes flooded the Property. *Id.* at 1264.

> Privately owned land does not become part of a navigable body of water when a nearby navigable body of water overflows its normal bed and temporarily covers the property. Gassoway Lake is landlocked and does not now lie in the bed of the Mississippi river, which is some three and one-half miles to the east; likewise, it is not a channel of the river, since it is cut off from it.

Id. (citations omitted). In addition, the court held that Gassoway Lake was not a navigable body of water owned by the State because it was not a navigable body of water in fact. *Id.* at 1265-66.

Nevertheless, the Second Circuit Court of Appeal lifted the state trial court's injunction because Walker lacked standing to seek relief against a hypothetical public-at-large. *Id.* at 1267. The court stated that while "[o]wners of private property may forbid entry to anyone for purposes of hunting or fishing and the like[,]" Walker could only ask for relief against a specific individual after that person had invaded the Property. *Id.* The court declined to resolve whether there was a public servitude on the Property during the Mississippi River's peak stage. It observed that under Louisiana law, the bank of the Mississippi

River consists of all the land lying between its ordinary low and high water marks, which includes all of the Property, and noted that a public servitude preserves a river's bank for the public's navigational use. *Id.* at 1268 & n.16. And while it stated that "[f]ishing and hunting on flooded lands do not meet the definition of using the bank of a river at its high water mark for a navigational purpose[,]" *id.* at 1268 n.6 (citations omitted), it "pretermit[ted] discussion" of the issue because the State had not properly raised it, *id.* at 1268.

On June 3, 2005, the Second Circuit Court of Appeal's decision became final when the Louisiana Supreme Court denied the State's application for a writ of certiorari. In light of the conclusion of the state court proceedings, on August 16, 2005, the district court lifted the stay in this case. The court ordered the parties to file supplemental briefs in support of their cross-motions for summary judgment and referred the matter to a magistrate judge for a report and recommendation. Sheriff Shumate filed briefs arguing that: (1) the case was moot because Plaintiffs merely sought relief "until the Second Circuit rules"; (2) there is no federal or state right to fish on private property above the Mississippi River's ordinary low mark; and (3) even if there was such a right, he was entitled to qualified immunity because it was not a clearly established constitutional right. Plaintiffs, on the other hand, argued that they were entitled to summary judgment because there is both a state and federal right to fish on the Property when it

is submerged under the Mississippi River. They asserted that the case was not moot because their complaint sought damages for false arrest and an injunction, not just until the state proceeding was complete, but until the public's "navigational rights" were determined. Finally, they contended that Sheriff Shumate was not entitled to qualified immunity because he was not being sued in his personal capacity.

On April 21, 2005, the magistrate judge issued his report and recommendation. He rejected Sheriff Shumate's alternative arguments, stating that: (1) the case was not moot because the state appellate court expressly pretermitted ruling on the issue of navigational rights; and (2) Sheriff Shumate was not entitled to qualified immunity because the case was not brought against him in his personal capacity. Turning to the fundamental question in the case, the magistrate judge held that no federal statute authorized Plaintiffs to fish on the Property, nor did the "federal navigational servitude," which is derived from the Commerce Clause of the United States Constitution, grant persons the right to fish on navigable waters. However, the magistrate judge determined that federal common law *did* create a right to fish on navigable waters, and that this public right burdens the Property when it is submerged under the waters of the Mississippi River. Similarly, the magistrate judge held that Louisiana law grants to the public the right to use – including for purposes of

fishing – the "running waters" found in the State, regardless of the river's stage.

On August 29, 2006, the district court adopted the report and recommendation in part. It agreed that neither federal statutes nor the federal navigational servitude provides Plaintiffs with the right to fish on the Property. The district court disagreed, however, with the magistrate judge's determination that federal common law and state law granted such a right. The district court stated that while this court has recognized a public right to reasonably use navigable waters, we have not found a right to fish on private lands. Moreover, although the district court found that the Property is a bank of the Mississippi River under Louisiana law and subject to a state servitude, the servitude "is limited to activities that are incidental to the navigable character of the Mississippi River and its enjoyment as an avenue of commerce. . . . [F]ishing and hunting are not included in these rights." Accordingly, the district court found that Sheriff Shumate had probable cause to arrest Plaintiffs for trespass and entered summary judgment on Sheriff Shumate's behalf.

This timely appeal followed.

II. DISCUSSION

We review a grant of summary judgment de novo, viewing all the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *See Crawford v.*

Formosa Plastics Corp., 234 F.3d 899, 902 (5th Cir. 2000). "Summary judgment is proper when the evidence reflects no genuine issues of material fact and the non-movant is entitled to judgment as a matter of law." *Id.* (citing FED. R. CIV. P. 56(c)). "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In order to prevail in a § 1983 claim for false arrest, a plaintiff must show that he was arrested without probable cause in violation of the Fourth Amendment. *Brown v. Lyford,* 243 F.3d 185, 189 (5th Cir. 2001) (citations omitted). In a suit brought against a municipal official in his official capacity, the plaintiff must show that the municipality has a policy or custom that caused his injury. *Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985); *Monell v. N.Y. City Dept. of Soc. Servs.*, 436 U.S. 658, 689 (1979). If a municipal officer who has authority to establish final municipal policy makes a decision or orders a course of action, the municipality may be held liable for the officer's decision or order. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480-82 (1986); *see also Turner v. Upton County, Texas,* 915 F.2d 133, 136 (5th Cir. 1990) (holding that the municipality may be held liable for the illegal or unconstitutional actions of its final policy-makers as they engage in the setting of goals and the determination of how those goals will be achieved).

In this case, Sheriff Shumate does not argue that he lacked final policy-making authority. Nor does he continue to argue that he is entitled to qualified immunity, accepting Plaintiffs' assertion that they do not seek to hold him liable in his individual capacity. The key issue, therefore, is whether Plaintiffs have either a federal or state right to fish on the Property in the spring during the Mississippi River's normal flood stage. If they do not, Sheriff Shumate had probable cause to arrest them for trespass and was entitled to prevail on summary judgment.

A. Federal Rights

Plaintiffs argue that they have a federal right to fish on the Property when it is covered by the Mississippi River's waters because the Mississippi River is a navigable waterway of the United States. They contend that a federal navigational servitude burdens the Property, creating a public right to fish there. Plaintiffs also assert that there is a corresponding federal common law right to fish on the navigable waters of the United States. In response, Sheriff Shumate argues that: (1) the Property is not burdened by any federal easements because the Property is not a navigable waterway in fact; (2) the federal navigational servitude does not create a right to fish; and (3) there is no federal common law affecting riparian land owners' property interests.

It is well established that the Commerce Clause of the United States Constitution gives the federal

government a "dominant servitude" over the navigable waters of the United States. *United States v. Cherokee Nat. of Okla.,* 480 U.S. 700, 704 (1987) (citation omitted). The so-called navigational servitude extends "laterally to the entire water surface and bed of a navigable waterway, which includes all the land and waters below the ordinary high water mark." 33 C.F.R. § 329.11(a); *see also United States v. Rands,* 389 U.S. 121, 123 (1967). A river's ordinary high water mark is set at "the line of the shore established by the fluctuations of water. . . ." 33 C.F.R. § 329.11(a)(1). It is ascertained by "physical characteristics such as a clear, natural line impressed on the bank; . . . changes in the character of the soil; destruction of terrestrial vegetation; . . . or other appropriate means that consider the characteristics of the surrounding areas." *Id.* The navigational servitude does not burden land that is only submerged when the river floods. *Oklahoma v. Texas,* 260 U.S. 606, 632 (1923); *United States v. Harrell,* 926 F.2d 1036, 1041-43 (11th Cir. 1991); *United States v. Claridge,* 416 F.2d 933, 934 (9th Cir. 1970).[4]

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[4] Plaintiffs argue that the Property is below the high water mark based on the Second Circuit Court of Appeal's finding that the high water mark is one hundred and twelve feet above mean sea level (the high water mark during the spring flooding season). The explanation for the Louisiana court's conclusion is that Louisiana has rejected the federal definition of high water mark and relies, instead, on the ordinary seasonal flood levels. *DeSambourg v. Bd. of Comm'rs for the Grand Prairie Levee Dist.,* 621 So.2d 602, 612 (La. 1993). Unfortunately, neither party

(Continued on following page)

As implied by its very name and the constitutional provision from which it arises, the federal navigational servitude is concerned with *navigational* rights and *commerce*. *See United States v. Montana,* 450 U.S. 544, 551 (1981) ("The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce."); *Kaiser Aetna v. United States,* 444 U.S. 164, 177 (1979) ("The navigational servitude . . . gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce."); *United States v. Chi. M., St. P. & P.R. Co.,* 312 U.S. 592, 596 (1941) ("[T]he rights of the title holder are subordinate to the dominant power of the federal Government in respect of navigation.") (citing *Gibson v. United States,* 166 U.S. 269, 272 (1897)). Neither navigation nor commerce encompass recreational fishing. *See Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 482-84 (1988) (noting that fishing is not related to navigability); *George v. Beavark, Inc.,* 402 F.2d 977, 981 (8th Cir. 1968) ("Although the rule on navigability has been at times liberalized, to our

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submitted sufficient summary judgment evidence to determine where the federal high water mark lies, although it is unlikely that it includes much of the Property. *See United States v. Harrell,* 926 F.2d at 1043 ("To argue that the government's jurisdiction should extend laterally as much as three miles on either side of the Tombigbee river is ludicrous.").

knowledge none of the authoritative cases has liberalized the rule so as to indicate that mere pleasure fishing on a stream of water is such usage as would constitute navigability."). Accordingly, the navigational servitude does not create a right to fish on private riparian land.

Moreover, Plaintiffs' claim to a federal right ignores "the 'general proposition [that] the law of real property is, under our Constitution, left to the individual States to develop and administer.'" *Phillips Petroleum,* 484 U.S. at 484 (citation omitted). Louisiana took title to all lands below navigable waters in its boundaries when it was admitted to the Union. *Dardar,* 985 F.2d 824, 826-27 (citation omitted); *see also Texas v. Louisiana,* 410 U.S. 702, 714 (1973); *Utah v. United States,* 403 U.S. 9, 10 (1971); *Pollard's Lessee v. Hagan,* 44 U.S. 212, 230 (1845). It has broad authority to regulate public trust lands, including the Property, as it sees fit. *See Phillips Petroleum,* 484 U.S. at 482-84. Louisiana may regulate or prohibit the use of land held in public trust. *See McCready v. Virginia,* 94 U.S. 391, 395 (1876) (upholding a state statute that prohibited non-state citizens from planting oysters in tidal lands); *Smith v. Maryland,* 59 U.S. 71, 74-75 (1855) (upholding a state statute that prohibited a federally licensed ship from dredging for oysters in the Chesapeake Bay). It may "retain[ ] for the general public the right to fish, hunt, or bathe on these lands." *Phillips Petroleum,* 484 U.S. at 482-84. Or, as it did here, it may relinquish title to a private landowner. *Id.* at 483; *see also Dardar,* 985 F.2d at

830 (stating that Louisiana may relinquish lands that are periodically overflown by the waters of the Mississippi). In any event, as things now stand, the right to fish on public trust lands is governed by Louisiana law, and there is no reason for us to displace that law by adopting a federal rule of decision in this context.[5] *See Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) (stating that it is for Congress to decide whether latent federal power should be exercised to displace state law).

B. State Navigational Servitude

Plaintiffs argue that a state servitude burdens the Property and grants them the right to fish upon it when it is flooded. Plaintiffs assert that this right exists in the Louisiana Constitution, which provides that the freedom to hunt, fish, and trap wildlife is a valued natural heritage that will be forever preserved. *See* LA. CONST. art. I, § 27. They also find support in the Louisiana Civil Code, which provides

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[5] Plaintiffs argument to the contrary based on purported federal common law is unavailing. Plaintiffs point us to state court decisions that provide citizens with a state right to fish on navigable waters. But those cases merely prove that states generally regulate the use of public trust lands. Plaintiffs also rely on *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356, 359 (5th Cir. 1931), where we stated that the owner of the bed of a navigable body of water in Florida could not enjoin the public from using the waters "for boating or sailing for pleasure." But again, *Silver Springs* is inapplicable because it applied state law to determine the scope of navigational rights. *Id.*

that everyone has the right to fish in the State's rivers. *See* LA. CIV. CODE ANN. art. 452. Finally, they contend that the Property is burdened by the State for the public's use because Louisiana owns all of the running waters in the State. *See id.* art. 456. In response, Sheriff Shumate argues that the right to fish in Louisiana is explicitly limited to public lands and does not extend to private riparian property. Moreover, he argues that the Second Circuit Court of Appeal, while failing to hold that the Property is free of a state servitude because the issue was not properly raised, left a "guide post" for this court by noting in passing that the public does not have a right to fish on private lands. We agree with Sheriff Shumate.

First, the Louisiana Constitution, far from creating a private right to fish on the Property, explicitly reserves to private property owners the right to refuse consent to fishermen's entry on their land. The article Plaintiffs rely on reads:

> The freedom to hunt, fish, and trap wildlife, including all aquatic life, traditionally taken by hunters, trappers and anglers, is a valued natural heritage that shall be forever preserved for the people. . . . Nothing contained herein shall be construed to authorize the use of private property to hunt, fish, or trap without the consent of the owner of the property.

See LA. CONST. art. I, § 27.[6] When the article is read in full, it is plain that the right to fish is circumscribed and does not extend to waters on private property.

Second, the Louisiana Civil Code does not create a right to fish upon the Property, even if we assume that the Property in its entirety is a bank of the Mississippi River. Under Louisiana law, the "banks of navigable rivers are private things that are subject to public use." LA. CIV. CODE ANN. art. 452; *see also Buckskin Hunting Club v. Bayard,* 868 So.2d 266, 275-76 (La. Ct. App. 2004). The public use, however, is limited to use for navigational purposes. *Walker Lands,* 871 So.2d at 1268 n.6 (citations omitted); *Buckskin Hunting Club,* 868 So.2d at 14 (citation omitted). As stated in the comments to article 456, "[a]ccording to well-settled Louisiana jurisprudence, which continues to be relevant, the servitude of public use under this provision is not 'for the use of the public at large for all purposes' but merely for purposes that are 'incidental' to the navigable character of the stream and its enjoyment as an avenue of commerce." LA. CIV. CODE ANN. art. 452 cmt. b (citations omitted). The Second Circuit Court of Appeal noted, in the parallel state proceeding, that fishing on

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[6] This section of the Louisiana Constitution did not become effective until December 7, 2004. We, therefore, do not cite it for the proposition that Sheriff Shumate had probable cause to arrest Plaintiffs, but to show that the hortatory passage Plaintiffs rely on is limited in nature.

the banks of the Mississippi River does not meet the definition of a navigational use. *Walker Lands,* 871 So.2d at 1268 n.6 (citations omitted). We agree. *See, e.g., State v. Barras,* 602 So.2d 301, 305 (La. Ct. App. 1992) (holding that fishing was not incidental to navigation); *Edmiston v. Wood,* 566 So.2d 673, 675-76 (La. Ct. App. 1990) (same).

Finally, we reject Plaintiffs' argument that they have the right to fish on the Property when it is submerged under the Mississippi River because "running waters" are public things owned by the State. Under Louisiana law, "public things" belong to the State, and "public things" include "running waters." LA. CIV. CODE ANN. art. 456. Plaintiffs argue that the public has a right to fish on the running waters of the State based on *Chaney v. State Mineral Bd.,* 444 So.2d 105 (La. 1983). In that case, the Louisiana Supreme Court stated that the running waters over non-navigable streams are preserved for the general public. *Id.* at 109. This court has since determined that claims to the use of waterways based on *Chaney* have "failed to carry the day in Louisiana courts." *Dardar,* 985 F.2d at 834 (citation omitted). We have no reason to deviate from that holding. To the contrary, the Third Circuit Court of Appeal of Louisiana recently stated that although an owner must permit running waters to pass through his estate, Louisiana law "does not mandate that the landowner allow public access to the waterway." *Buckskin Hunting Club,* 868 So.2d at 274.

III. CONCLUSION

For the reasons stated above, we AFFIRM the district court's judgment.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORMAL PARM, JR., ET AL	**CIVIL ACTION NO. 01-2624**
VERSUS	**JUDGE ROBERT G. JAMES**
MARK W. SHUMATE	**MAG. JUDGE JAMES D. KIRK**

RULING

(Filed Aug. 29, 2006)

Pending before the Court are a motion for partial summary judgment [Doc. No. 5] filed by the Plaintiffs[1] and cross-motion for summary judgment or in the alternative motion for abstention [Doc. No. 11] filed by Defendant Sheriff Mark W. Shumate of East Carroll Parish ("Sheriff Shumate").

On April 21, 2006, Magistrate Judge James D. Kirk issued a Second Report and Recommendation [Doc. No. 82] recommending that the Plaintiffs' motion for partial summary judgment be granted in part and denied in part. Magistrate Judge Kirk also

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[1] The Plaintiffs in this matter include Normal Parm, Jr., Harold Eugene Watts, Roy Michael Gammill, William T. Rogers, and Robert Allen Balch.

recommended that Sheriff Shumate's cross-motion for summary judgment be denied.[2]

On May 5, 2006, the Plaintiffs filed an objection [Doc. No. 91] to the Second Report and Recommendation. On May 11, 2006, Sheriff Shumate also filed an objection [Doc. No. 95]. Both parties filed responses to each other's objections [Doc. Nos. 99 and 100].

On May 30, 2006, Walker Cottonwood Farms, LLC ("Walker Cottonwood Farms"), successor in title to Walker Lands, Inc. ("Walker Lands"), filed an amicus curiae brief [Doc. No. 102] in support of Sheriff Shumate's objections to the Second Report and Recommendation.

On June 28, 2006, an amicus curiae brief [Doc. No. 116] was filed by numerous fishing organizations in support of the Plaintiffs' objections to the report.[3]

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[2] Magistrate Judge Kirk recommended in his First Report and Recommendation [Doc. No. 22] that Defendant's cross-motion for summary judgment should be granted to the extent that the case should be abstained pending resolution of the state court proceedings.

[3] These organizations include the Louisiana Crawfish Producers Association, Arkansas State Bass Federation, Big Sun Bass Masters of Bellview Florida, Maple Bassmasters of Florida, Blackhawk Bassmasters of Illinois, Bardstown Bassmasters of Kentucky, Kentucky State Bass Federation, Louisiana State Bass Federation, Louisiana Wildlife Federation, Rowa of Louisiana, Minnesota State Bass Federation, River Rats Bassmasters of Minnesota, Mississippi Bass Federation Nation,

(Continued on following page)

On July 27, 2006, an amicus curiae brief [Doc. No. 134] was filed by the Edward Wisner Donation in support of Sheriff Shumate's objections to the report.

For the following reasons, the Court ADOPTS IN PART AND DECLINES TO ADOPT IN PART the findings and conclusions set forth in the Magistrate Judge's Report and Recommendation.

I. FACTS AND PROCEDURAL HISTORY[4]

The Plaintiffs bring this instant action against Sheriff Shumate seeking a declaratory judgment, injunctive relief, and damages under 42 U.S.C. § 1983 and Louisiana state law. The Plaintiffs sued Sheriff Shumate in his official capacity claiming that they were arrested without probable cause for fishing and hunting on waters of the Mississippi River, which

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Western Main Anglers, Yankee Bassers Bass Club of Maine, and the Pennsylvania Bass Federation, Inc.

[4] Magistrate Judge Kirk has already succinctly characterized the facts and procedural history of this case in his Second Report and Recommendation. The Court will incorporate portions of Magistrate Judge Kirk's factual background and procedural history in this Ruling.

covered Walker Cottonwood Farms'[5] property during periodic flooding.[6]

On August 22, 2002, Magistrate Judge Kirk issued his first Report and Recommendation [Doc. No. 22] recommending that this case be stayed pending the outcome of state court litigation in *Walker Lands, Inc. v. East Carroll Parish Police Jury,* 38,367-CA (La. App. 2 Cir. 4/14/04); 871 So.2d 1258 ("*Walker Lands*"). On October 29, 2002, this Court adopted Magistrate Judge Kirk's Report and Recommendation and stayed the case. [Doc. No. 27]. On July 9, 2003, the United States Court of Appeals for the Fifth Circuit affirmed this Court's decision to stay the case. [Doc. No. 32].

A. State Court Decision

In the *Walker Lands'* case, Walker Lands originally filed suit against the East Carroll Parish Police Jury to enjoin all public use of Gassoway Lake and a drainage ditch that runs from the southern end of Gassoway Lake to Bunch's Cutoff, a large body of water that connects with the Mississippi River. The

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[5] Walker Cottonwood Farms is successor in title to Walker Lands' property. However, the record is unclear as to when Walker Cottonwood Farms obtained title to Walker Lands' property.

[6] For purposes of this Ruling, Walker Cottonwood Farms' property includes Gassoway Lake, "the drainage ditch," Little Gassoway Lake, Doe Lake, and Bunch's Cutoff (to the extent it lies within the State of Louisiana).

State of Louisiana ("the State") was added as an indispensable party. The State answered, claiming ownership or, alternatively, a servitude on the disputed lands.[7] Walker Lands also claimed ownership of the disputed lands.

On appeal, the Louisiana Second Circuit Court of Appeal ("Second Circuit") affirmed the trial court's findings that Gassoway Lake was formed when the Mississippi River first moved westward in the 1860's and 1870's and then slowly moved back eastward forming Gassoway Lake in a shallow swale by 1894. *Walker Lands*, 871 So.2d at 1261-62. The court also concluded that, presently, the Mississippi River's ordinary low water mark is 77 feet and its ordinary high water mark is 112 feet at the area in question.[8] *Id.* at 1262. In addition, the court found that Gassoway Lake and surrounding property "only receives water when the Mississippi River floods, which causes water to run through the ditch and eventually [spill] over into the lake." *Id.*

The Second Circuit did not accept the State's argument that Gassoway Lake and the drainage ditch are navigable. The Second Circuit concluded that Gassoway Lake and the surrounding land are located approximately three and a half miles west of

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[7] The East Carroll Parish Police Jury was later dismissed from the lawsuit.

[8] Magistrate Judge Kirk noted that Gassoway Lake's normal elevation is approximately 95 feet. [Doc. No. 82, p. 7].

the Mississippi River, the property remains "completely dry for most of the year, making it unusable," and the property serves no useful commercial purpose. *Id.* at 1265-66. Ultimately, the Second Circuit held that Walker Lands owns Gassoway Lake, the drainage ditch, and other surrounding lands adjacent to the Mississippi River because the property is not "navigable in fact; and, thus, not navigable in law." *Id.* at 1262.[9]

B. Second Report and Recommendation

Following the Second Circuit's decision, this Court re-opened these proceedings. In the Plaintiffs' motion for partial summary judgment, they argue that Sheriff Shumate lacks probable cause to arrest them for trespass under La. Rev. Stat. § 14:63 while they are on the waters of the Mississippi River when those waters cover Walker Cottonwood Farms' property. The Plaintiffs also seek a declaration that Sheriff Shumate lacks sufficient evidence to support a verdict of guilty beyond a reasonable doubt that the Plaintiffs are guilty of trespass. Additionally, the Plaintiffs seek a permanent injunction against Sheriff Shumate, enjoining him from arresting the Plaintiffs

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[9] The state court decision in *Walker Lands* became final after the Louisiana State Supreme Court denied writ on June 3, 2005, and a motion for rehearing on November 28, 2005. *See Walker Lands, Inc. v. East Carroll Parish Police Jury*, 903 So.2d 442 (La. 2005) and *Walker Lands, Inc. v. East Carroll Parish Police Jury*, 916 So.2d 127 (La. 2005).

and other persons for trespass on the lands of Walker Cottonwood Farms when the waters of the river cover that property. In Sheriff Shumate's cross-motion for summary judgment, he asks that the Plaintiffs' claims be dismissed and asserts the defense of qualified immunity.

In the Second Report and Recommendation, Magistrate Judge Kirk found that the Plaintiffs have both a federal common law right and a state law right to fish and hunt on the Mississippi River between the ordinary high and low water mark regardless of the status of the ownership of the property located below the waters.[10]

Applying federal law, Magistrate Judge Kirk first found that neither 33 U.S.C. § 10 nor the federal navigational servitude provides the Plaintiffs with the right to fish and hunt on the Mississippi River. However, Magistrate Judge Kirk did find that the Plaintiffs have a federal common law right of navigation "which includes the right to reasonably use the Mississippi's waters for the purposes, among other things, of navigation including travel and transportation, commerce, boating, sailing, and fishing and hunting from boats," up to the ordinary high water mark, regardless of who owns the land beneath the waters. [Doc. No. 82, p. 14].

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[10] Federal law defines high water mark differently than state law. *See* 33 C.F.R. § 329.11. The different definitions, however, do not substantively change the Court's analysis.

Applying state law, Magistrate Judge Kirk also found that the Plaintiffs have a right to fish and hunt on the Mississippi River up to the ordinary high water mark, when the waters cover privately owned banks of the Mississippi River.

Based on these conclusions, Magistrate Judge Kirk then determined that Sheriff Shumate did not have probable cause to arrest the Plaintiffs under La. Rev. Stat. 14:63 for trespass on Walker Cottonwood Farms' property when it is covered by the Mississippi River between the ordinary high and low water mark.

II. LAW AND ANALYSIS

The Court reviews *de novo* a magistrate judge's report and recommendation if a party files specific, written objections within ten days of service. 28 U.S.C. § 636(b)(1). In the present case, both parties timely filed objections [Doc. Nos. 91 and 95] to the Magistrate Judge's Report and Recommendation, thus warranting *de novo* review by the Court.

First, for the reasons stated in Magistrate Judge Kirk's Second Report and Recommendation, the Court ADOPTS his recommendation to the extent that 33 U.S.C. § 10 and the federal navigational servitude do not provide the Plaintiffs with the right to fish and hunt on the Mississippi River. However, for the reasons discussed below, the Court DECLINES TO ADOPT Magistrate Judge Kirk's recommendation that the Plaintiffs have a federal common law right to fish and hunt on the Mississippi

River, up to the high water mark, when it floods privately owned land.

Second, the Court also ADOPTS Magistrate Judge Kirk's recommendation to the extent that Walker Cottonwood Farms' property is a bank of the Mississippi River and subject to public use up to the ordinary high water mark, as defined by Louisiana law. However, for the reasons discussed below, the Court DECLINES TO ADOPT his recommendation to the extent that he found the Plaintiffs have a right to fish and hunt on the Mississippi River up to the ordinary high water mark when it periodically floods Walker Cottonwood Farms' property.

Third, the Court ADOPTS Magistrate Judge Kirk's recommendation to the extent that Sheriff Shumate is not entitled to qualified immunity. However, for the reasons discussed below, the Court DECLINES TO ADOPT Magistrate Judge Kirk's recommendation to the extent that Sheriff Shumate did not have probable cause to arrest the Plaintiffs under La. Rev. Stat. § 14:63 for trespass on Walker Cottonwood Farms' property when it is covered by the Mississippi River.

The Court also ADOPTS Magistrate Judge Kirk's recommendation to the extent that the Plaintiffs are not entitled to an injunction against Sheriff Shumate enjoining him from enforcing Louisiana trespass laws.

A. Federal Common Law Right

Magistrate Judge Kirk found that a common law right of navigation exists on the Mississippi River, and that this right of navigation includes the right to fish and hunt up to the high water mark.

In support of this conclusion, Magistrate Judge Kirk cited *Silver Springs Paradise Co. v. Ray,* 50 F.2d 356 (5th Cir. 1931), for the general proposition that the public right of navigation "entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as for carrying persons or property for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common." *Id.* at 359.

The Court disagrees with Magistrate Judge Kirk's finding. Although the Fifth Circuit stated in *Silver Springs* that the public has a right to reasonably use navigable waters for "legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as carrying persons or property for hire," the Fifth Circuit did not specifically find that the public has a federal common law right to fish or hunt on a navigable source of water. Therefore, the Court declines to interpret the Fifth Circuit's decision so broadly as to find that the Plaintiffs have a federal common law right to fish or hunt on a navigable water, such as the Mississippi

River, when those waters periodically flood privately owned lands.

B. State Law Right

In Louisiana, "[t]he banks of navigable rivers or streams are private things that are subject to public use." La. Civ. Code art. 456. "The bank of a navigable river or stream is the land lying between the ordinary low and the ordinary high stage of the water. . . ." *Id.*

Because Walker Cottonwood Farms' property is located between the ordinary high and low water mark established by the Second Circuit, Magistrate Judge Kirk found that it is a bank of the Mississippi River and subject to public use. Magistrate Judge Kirk stated that, "the right to use the river's waters includes the right to use the entirety of the waters, regardless [sic] the river's level or stage or how much of its bank it covers," up to the high water mark. [Doc. No. 82, pp. 20-21].

The Court agrees with Magistrate Judge Kirk's finding to the extent that Walker Cottonwood Farms' privately owned property is subject to public use because it is a bank of the Mississippi River. Such public use, however, is limited to activities that are incidental to the navigable character of the Mississippi River and its enjoyment as an avenue of commerce. The Court finds that fishing and hunting are not included in these rights.

Comment (b) to La. Civ. Code art. 456 states, in pertinent part:

> (b) Article 455(1) of the Louisiana Civil Code of 1870 declares that "everyone has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like". According to well-settled Louisiana jurisprudence, which continues to be relevant, the servitude of public use under this provision is not "for the use of the public at large for all purposes" but merely for purposes that are "incidental" to the navigable character of the stream and its enjoyment as an avenue of commerce.

The Second Circuit and other Louisiana courts have interpreted La. Civ. Code art. 456 to exclude fishing and hunting from the type of public use permitted on flooded private property because these activities do not "meet the definition of using the bank of a river at its high water mark for a navigational purpose." *See Walker Lands,* 871 So.2d at 1268 n.16 (citing *State v. Barras,* 615 So.2d 285 (La. 1993) and *Warner v. Clarke,* 232 So.2d 99 (La. App. 2d Cir. 1970)); *see also Buckskin Hunting Club v. Bayard,* 03-1428 (La. App. 3 Cir. 3/3/04); 868 So.2d 266, 273 (using the banks along navigable rivers is "limited to navigation and not hunting."); *Edmiston v. Wood,* 566 So.2d 673, 675-76 (La. App. 2d Cir. 1990) (fishing and hunting in a boat over flooded private property are not incidental to navigable character of

the stream and its enjoyment as an avenue of commerce).

Therefore, this Court concludes that the Plaintiffs' activities, to the extent they include fishing and hunting, are not permitted on Walker Cottonwood Farms' property, because these activities are not "incidental to the navigable character of the [river] and its enjoyment as an avenue of commerce." La. Civ. Code art. 456 cmt. (b).

C. 42 U.S.C. § 1983 and probable cause

A police officer may arrest a person if the officer has probable cause to believe that person committed a crime. *Tennessee v. Garner,* 471 U.S. 1, 7 (1985); *see also* La. Code Crim. Proc. art. 213.[11] The United States Supreme Court has explained that "probable cause to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo,* 443 U.S. 31, 37 (1979).

Louisiana courts have explained probable cause as the following:

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[11] The constitutional torts of false arrest, unreasonable seizure, and false imprisonment also require a showing of no probable cause. *See Brown v. Lyford,* 243 F.3d 185, 189 (5th Cir. 2001).

> Probable cause to arrest exists when the facts and circumstances within the officer's knowledge are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed a crime. . . . The determination of probable cause, although requiring something more than bare suspicion, does not require evidence sufficient to support a conviction. Probable cause, as the very name implies, deals with probabilities. . . . The determination of probable cause, unlike the determination of guilt at trial, does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the available evidence supports a reasonable belief that the person to be arrested has committed a crime. . . . The determination of probable cause involves factual and practical considerations of everyday life on which average men, and particularly average police officers, can be expected to act.

State v. Simms, 571 So.2d 145, 148-49 (La. 1990).

Magistrate Judge Kirk found that Sheriff Shumate arrested the Plaintiffs for trespassing without probable cause "because the sheriff should have known that the plaintiffs were legally authorized to be upon the waters." [Doc. No. 82, p. 28].

The Court disagrees with Magistrate Judge Kirk's finding. As discussed above, the Second

Circuit, La. Civ. Code art. 456, and Louisiana jurisprudence have not allowed fishing or hunting on privately owned banks of navigable waters because these activities are not incidental to the navigable character of the stream and its enjoyment as an avenue of commerce. Therefore, the Court concludes that Sheriff Shumate had probable cause to arrest the Plaintiffs for trespassing in violation of La. Rev. Stat. 14:63.

III. CONCLUSION

Based on the foregoing, the Court ADOPTS IN PART AND DECLINES TO ADOPT IN PART the findings and conclusions set forth in the Magistrate Judge's Second Report and Recommendation [Doc. No. 82].

The Court ADOPTS the Magistrate Judge's recommendation to the extent 33 U.S.C. § 10 and the federal navigational servitude do not provide the Plaintiffs with the right to fish and hunt on the Mississippi River.

The Court also ADOPTS the Magistrate Judge's recommendation to the extent that Walker Cottonwood Farms' property is a bank of the Mississippi River. The Court also ADOPTS the Magistrate Judge's recommendation to the extent that Sheriff Shumate is not entitled to qualified immunity and the Plaintiffs are not entitled to an injunction against Sheriff Shumate enjoining him from enforcing Louisiana trespass laws.

To the extent that Magistrate Judge Kirk found a federal common law right to fish and hunt over the privately owned lands of Walker Cottonwood Farms property when it is periodically flooded by the Mississippi River, the Court DECLINES TO ADOPT the Magistrate Judge's recommendation.

Also, to the extent that Magistrate Judge Kirk found that the Plaintiffs have a state law right to fish and hunt on Walker Cottonwood Farms' property, when it periodically floods from waters of the Mississippi River, the Court DECLINES TO ADOPT the recommendation, and the Plaintiffs' motion for partial summary judgment is DENIED.

To the extent Magistrate Judge Kirk found that Sheriff Shumate lacks probable cause to arrest the Plaintiffs for trespass in violation of La. Rev. Stat. 14:63 for fishing and hunting on privately owned banks of the Mississippi River, the Court DECLINES TO ADOPT the Magistrate Judge's recommendation, and Sheriff Shumate's cross-motion for summary judgment is GRANTED.

MONROE, LOUISIANA this 29th day of August, 2006.

/s/ Robert G. James
ROBERT G. JAMES
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORMAL PARM, JR., ET AL	**CIVIL ACTION NO. 01-2624**
VERSUS	**JUDGE ROBERT G. JAMES**
MARK W. SHUMATE	**MAG. JUDGE JAMES D. KIRK**

JUDGMENT

(Filed Aug. 29, 2006)

For the reasons contained in this Court's Ruling and for the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein, to the extent adopted, and after an independent review of the entire record and the written objections filed herein,

The Court ADOPTS IN PART AND DECLINES TO ADOPT IN PART the findings and conclusions set forth in the Magistrate Judge's Report and Recommendation [Doc. No. 82].

IT IS HEREBY ORDERED that the Defendant's cross-motion for summary judgment [Doc. No. 11] is GRANTED.

IT IS HEREBY FURTHER ORDERED that the Plaintiffs' motion for partial summary judgment [Doc. No. 5] is DENIED.

MONROE, LOUISIANA this 29th day of August, 2006.

/s/ Robert G. James
ROBERT G. JAMES
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORMAL PARM, JR., ET AL	**CIVIL ACTION NO. 01-2624**
VERSUS	**JUDGE ROBERT G. JAMES**
MARK W. SHUMATE	**MAG. JUDGE JAMES D. KIRK**

RULING

(Filed Oct. 11, 2006)

Pending before the Court is a Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment filed by Plaintiffs on September 9, 2006 [Doc. No. 141].

On August 29, 2006, the Court issued a ruling ("Ruling") [Doc. No. 139] adopting in part and declining to adopt in part the findings and conclusions set forth in the Magistrate Judge's Report and Recommendation [Doc. No. 82]. The Court also denied the Plaintiffs' motion for partial summary judgment [Doc. No. 5] and granted the Defendant's cross-motion for summary judgment [Doc. No. 11].

On September 21, 2006, Defendant filed a Memorandum in Opposition [Doc. No. 148] to the Plaintiffs' Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment.

On September 21, 2006, Walker Cottonwood Farms, LLC ("Walker") filed an Amicus Brief [Doc. No. 147] in Opposition to the Plaintiffs' Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment.

On September 29, 2006, Plaintiffs filed a Motion for Leave to File Reply Brief [Doc. No. 155] and it was denied by the Court on October 10, 2006.

After reviewing the documents submitted by the parties, the Court is now ready to rule. For the following reasons, Plaintiffs' Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment is DENIED.

I. Standard of Review

The Court may alter or amend a judgment within ten days upon motion by a party under Federal Rule of Civil Procedure 59(e). Fed. R. Civ. P. 59(e). The Court finds that Plaintiffs' motion was served within ten days of the Court's Ruling of August 29, 2006. Accordingly, this motion is governed by Rule 59(e).

The Court has discretion in deciding whether to reopen a case in response to a motion for reconsideration, but must balance the need for the litigation to close and the need to render just decisions based on the facts. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 n.14 (5th Cir.

1994) (*en banc*). Accordingly, a motion seeking review of a grant of summary judgment seeks "an extraordinary remedy that should be used sparingly." *Templet v. Hydrochem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) (citing *Clancy v. Employers Health Ins. Co.*, 101 F. Supp. 2d 463, 465 (E.D. La. 2000)).

Under Rule 59(e), the Court is guided by the following factors: (1) whether the judgment was based upon a manifest error of fact or law, (2) the existence of newly discovered or previously unavailable evidence, and (3) an intervening change in controlling law. *See* 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 2810.1 (2d ed. 1995).

II. Analysis

Plaintiffs argue that the Ruling made several factual errors critical to ascertaining the scope of federal and state servitudes, failed to apply binding precedent of the United States Supreme Court and the Fifth Circuit Court of Appeals, and failed to apply binding state legal authority.

A. Factual Error

Plaintiffs challenge the characterization of the disputed Walker Lands as "flooded" when the Mississippi River rises and falls between 77 and 112 feet mean sea level. Plaintiffs contend that flooding occurs when water rises above its normal high water level, here, above 112 feet mean sea level. Plaintiffs

argue this "clear factual error" by the Court is important because the Plaintiffs do not seek to use any of the "flooded" Walker Lands. However, the Ruling correctly focused on the Plaintiffs' rights on land between the normal low and high water mark and thus this mischaracterization (if any) does not affect the disposition.

Plaintiffs also argue the Court failed to distinguish between the river "bed" under federal law and the river "bed" and "bank" under state law, which are defined differently.[1] However, again, the Court correctly focused on the same area of land and water comprised by the federal river bed and state river bed and river bank.

B. Federal Precedent

Plaintiffs claim the Court failed to apply binding federal authority confirming the Plaintiffs' federal right to fish on the Walker Lands. These arguments were appropriately rejected by the Court and therefore do not provide a basis for reconsideration. However, the Court will briefly address several points.

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[1] Under federal law, the public's right to use navigable waters extends across the river "bed" of the navigable waterway, thus extending across the surface of the water laterally up to the normal high water mark. In contrast, under State law this same area is referred to cumulatively as the river bed and the river bank." [Doc. No. 141, p. 6].

The federal common law right of navigation allows the public to use navigable waters for "legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as carrying persons or property for hire." *Silver Springs Paradise Co. v. Ray,* 50 F.2d 356, 359 (5th Cir. 1931). However, the federal common law right of navigation does not provide a basis for the public to fish on navigable waters. *Id.* While Plaintiffs urge the Court to interpret *Silver Springs* broadly, the Court has declined to do so.

Further, the facts in the instant case do not provide a basis to extend the holding in *Silver Springs.* Unlike the submerged land in *Silver Springs* that had a direct connection to the navigable source of water, Gassoway Lake is more than three miles from the Mississippi River and remains landlocked most of the year. *See Walker Lands,* 38, 376-CA, p. 5 (La. App. 2 Cir. 4/14/04); 871 So.2d 1258, 1262. While the Plaintiffs in *Silver Springs* sought access in order to transport persons in boats for commercial purposes, the Plaintiffs here seek access in order to fish for recreational purposes. *Id.* at 1267.

Similarly, the federal navigational servitude under the Commerce Clause, if one were found to exist on the Walker Lands, does not yield a right to fish. *See Blanchard v. Williams,* No. 92-0941 (W.D. La. Sep. 19, 1995), *aff'd,* 98 F.3d 1339 (5th Cir. 1996). In *Blanchard v. Williams,* the Court declined to find a federal right to fish upon the surface of flooded swamplands lying between two navigable water

bodies. The Court reasoned that the scope of the servitude across the surface of the water only permitted uses incident to navigation, not fishing. *Id.* at 11. Moreover, the Court held that "the use of its bed and banks, and particularly public fishery rights therein, remain purely matters of state law." *Id.* at 12.

C. State Precedent

Plaintiffs claim the Court failed to apply binding state authority. Plaintiffs claim the Louisiana Constitution, statutes, and case law preserve a right to fish in the rivers of Louisiana. These arguments were appropriately rejected by the Court in the Ruling and therefore do not provide a basis for reconsideration. However, the Court will briefly address several points.

Article 1, Section 27 of the Louisiana Constitution does preserve a right to hunt and fish. However, this provision also recognizes the authority of the state to regulate such recreational uses and the right of private property owners to exclude users from private property. Therefore, Plaintiffs' argument that the Constitution creates an "inalienable" right to fish, hunt, and trap fails to recognize the intrinsic limits on this right.

The Plaintiffs also argue that, under state law, riparian ownership does not include control of navigable waters (upon which they assert their right to fish). Because they do not assert a right to use the

privately owned dry bank area of a navigable river and seek only the right to use the navigable waters themselves, Plaintiffs argue that the restrictions on bank servitudes in Louisiana Civil Code Article 456 do not apply. Therefore, on a navigable waterway at water levels between the normal low and high water mark, the Plaintiffs claim a right to fish "regardless of who owns the underlying ground."

However, the argument that the restrictions in Article 456 pertain only to "actions that a navigating public might need to do ON DRY GROUND" is without merit. The scope of the bank servitude under Article 456 does not change depending on whether a bank is dry or covered with water. State case law suggests that fishing and hunting are not incidental to navigation.[2] The Court rejects the Plaintiffs' attempts to distinguish this case law under their narrow reading.

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[2] *See Walker Lands*, 871 So.2d at 1268 n.16 (citing *State v. Barras*, 615 So.2d 285 (La. 1993) and *Warner v. Clarke*, 232 So.2d 99 (La. App. 2 Cir. 1970)) (concluding the right to hunt and fish upon water between the river and the levee is unrelated to navigation); *see also Buckskin Hunting Club v. Bayard*, 03-1428, p. 10 (La. App. 3 Cir. 3/3/04); 868 So.2d 266, 273 (finding that use of the banks along navigable rivers is "limited to navigation and not hunting."); *Edmiston v. Wood*, 566 So.2d 673, 675-76 (La. App. 2 Cir. 1990) (finding that fishing and hunting in a boat over flooded private property is not incidental to navigable character of the stream and its enjoyment as an avenue of commerce).

Plaintiffs also argue that their right to fish flows from the navigable character of the water itself and not ownership of the underlying land. The Second Circuit declined to find that Gassoway Lake and the drainage ditch are navigable. Therefore, when the surrounding Walker Lands are periodically inundated, the property, including the water flowing above the land, does not become navigable.

D. CONCLUSION

Louisiana is known as the "Sportsman's Paradise" because of its abundance of recreational opportunities, including fishing. However, access to those recreational opportunities must be balanced against the rights of private property owners. Having carefully considered and rejected the arguments presented by Plaintiffs and failing to find any manifest errors of fact or law, the Court finds that Plaintiffs' Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment is DENIED.

MONROE, LOUISIANA, this 11th day of October, 2006.

/s/ Robert E. James
ROBERT G. JAMES
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORMAL PARM, JR., ET AL	**CIVIL ACTION NO. 01-2624**
VERSUS	**JUDGE ROBERT G. JAMES**
MARK W. SHUMATE	**MAG. JUDGE JAMES D. KIRK**

ORDER

(Filed Oct. 11, 2006)

For the reasons contained in this Court's Ruling,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment [Doc. NO. 141] is DENIED.

MONROE, LOUISIANA, this 11th day of October, 2006.

/s/ Robert G. James
ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORMAL PARM Jr., et al CIVIL ACTION 3-01-2624

VERSUS

MARK W. SHUMATE, IN HIS OFFICIAL CAPACITY AS SHERIFF OF EAST CARROLL PARISH

U.S. DISTRICT JUDGE ROBERT G. JAMES

U.S. MAGISTRATE JUDGE JAMES D. KIRK

(Filed Apr. 21, 2006)

SECOND REPORT AND RECOMMENDATION

Before the court is a motion for partial summary judgment by plaintiffs [Doc. #5] and defendant's cross motion for summary judgment and alternative motion for abstention [Doc. #11], both of which are referred to me by the district judge for Report and Recommendation.

This is a suit for declaratory judgment, injunctive relief and for damages under the Civil Rights Act and Louisiana state law. Plaintiffs sue the sheriff of East Carroll Parish in his official capacity only, claiming in a complaint verified by all of the plaintiffs, that the plaintiffs have in the past, and desire in the future, to navigate over, and fish and hunt on, the waters of the Mississippi River, and in areas claimed to be owned by Walker Lands, Inc. (Walker Lands), including Gassoway Lake, Little Gassoway Lake, Bunch's Cutoff, Old River, "the old

channel", "and other miscellaneous and unnamed navigable water areas comprising a portion of the Mississippi River during normal water heights." Normal Parm, Jr., Harold Eugene Watts, Roy Michael Gammill, William T. Rogers and Robert Allen Balch (plaintiffs) claim they are fishermen, hunters and outdoorsmen.

Jurisdiction is founded by plaintiffs on the Civil Rights Act, 42 U.S.C. § 1983 et seq., and the Federal navigation laws found in 33 U.S.C. § 10, et seq., and applicable regulations, 33 C.F.R. § 329.4, the "Federal Navigational Servitude," the Rivers and Harbors Appropriation Act of 1899, and pendant jurisdiction as to the claims founded on state law.

By first Report and Recommendation [Doc. # 22], I found both Pullman type abstention and Colorado River abstention to be applicable and recommended that this case be stayed pending the outcome of state court litigation in *Walker Lands, Inc. and Hollybrook Land Company, Inc. v. East Carroll Parish Police Jury and State of Louisiana,* Civil action number 17, 746, Sixth Judicial District Court, Parish of East Carroll, Louisiana (the Walker Lands case). That case involved allegations as to the ownership of the areas in dispute here as well as questions of navigability. It was anticipated that the case would answer at least some of the issues presented here. U.S. District Judge Robert G. James ordered this case stayed in October 2002 [Doc. #27] and the Fifth U.S. Circuit Court of

Appeals affirmed the ruling based on Pullman type abstention [Doc. #32].[1]

The state court's decision in the Walker Lands case became final after the Louisiana Second Circuit Court of Appeals ruled on April 14, 2004, at 871 So.2d 258 (2d Cir. 2004) and the state Supreme Court denied the sheriff's writ application in June of 2005, at 903 So. 2d 442 (La. 2004). This court then re-opened these proceedings. Following delays caused to some of the attorneys by Hurricane Katrina, all briefs were filed by December 28, 2005. Permission to file an amicus curiae brief was granted to the Waterways Access Association, a non-profit Louisiana corporation whose stated purpose is, among other things, "to protect the citizen's (sic) right to access navigable waterways and the natural overflow; to insure the continuation of the hunting and fishing heritage and other outdoor recreational opportunities of the citizens of the community, region and state . . . ".[2] Some, but not all, of the plaintiffs are members of that association, and that association is plaintiff in a related case pending in this court (see footnote 2) which remains stayed. An amicus curiae brief by Walker Lands was also allowed filed.[3]

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[1] *Parm v. Shumate*, 73 Fed. Appx. 78 (5th C. 2003).

[2] See complaint, Doc. #1, paragraph II., in *Waterways Access Association v. Walker Lands, Inc. and Hollybrook Land Co., Inc.*, docket number 99 cv 1750 on the docket of this court.

[3] Walker Lands has filed evidence attached to its amicus brief. A person granted special amicus status may file a brief as

(Continued on following page)

Plaintiffs, in their motion for summary judgment, ask this court to find the sheriff lacks probable cause to arrest the plaintiffs for trespass under La. R. S. 14:63 while they are on the waters of the Mississippi river, declaring that the sheriff lacks sufficient evidence to support a verdict of guilty beyond a reasonable doubt that plaintiffs are guilty of trespass, and granting a permanent injunction against the sheriff enjoining him from arresting the plaintiffs and other persons while on the disputed area.

The sheriff, in his cross motion, asks that plaintiffs' claims be dismissed and asserts the defense of qualified immunity.

The Law of Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure mandates that a summary judgment:

> "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, [submitted concerning the motion for summary judgment], if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

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allowed by this court's order but may not submit evidence. It is not a party to this case. Therefore, the attachments will not be considered and have been ordered stricken from the record.

Paragraph (e) of Rule 56 also provides the following:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

Local Rule 56.2W also provides that all material facts set forth in a statement of undisputed facts submitted by the moving party will be deemed admitted for purposes of a motion for summary judgment unless the opposing party controverts those facts by filing a short and concise statement of material facts as to which that party contends there exists a genuine issue to be tried. Since plaintiff has not attempted to controvert any of the specific facts stated in the defendant's statement of undisputed facts, those facts will be deemed admitted for purposes of this motion.

A party seeking summary judgment always bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 106 S.Ct. 2548 at 2552; *International Ass'n. of*

Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., Inc., 812 F.2d 219, 222 (5th Cir. 1987). However, movant need not negate the elements of the nonmovant's case. *Litttle v. Liquid Air Corporation,* 37 F.3d 1069 (5th Cir. 1994). Once this burden has been met, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." *Izen v. Catalina* 382 F.3d 566 (5th Cir. 2004), Fed. R. Civ. P. 56(e). All evidence must be considered, but the court does not make credibility determinations. If the movant fails to meet its initial burden, summary judgment should be denied. *Little,* 37 F.3d at 1075.

However, the non-movant, to avoid summary judgment as to an issue on which it would bear the burden of proof at trial, may not rest on the allegations of its pleadings but must come forward with proper summary judgment evidence sufficient to sustain a verdict in its favor on that issue. *Austin v. Will-Burt Company,* 361 F.3d 862, (5th Cir. 2004). This burden is not satisfied with "some metaphysical doubt as to the material facts," by "conclusory allegations," by "unsubstantiated assertions," or by only a "scintilla" of evidence. *Little,* id.

In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." *Celotex* at 2553.

BACKGROUND

The case before the Louisiana Second Circuit Court of Appeal was Walker Lands' case filed against the East Carroll Parish Police Jury to stop all public use of Gassoway Lake and a drainage ditch which runs from the southern end of Gassoway Lake to Bunch's Cutoff, a large body of water that connects, at least on its southern end, with the Mississippi River. See Exhibit A, a topographic map of the disputed area.[4] The State of Louisiana was added to the case as an indispensable party. The State answered claiming ownership or, alternatively, a servitude on the disputed lands. Walker Lands also claimed ownership.

The Louisiana court of appeal affirmed the trial court's finding that Gassoway Lake was formed when the Mississippi first moved westward in the 1860's and 1870's and then slowly moved back eastward and formed Gassoway Lake at least by 1894. The court found that the lake and the lands between it and the Mississippi River were formed by accretion which deposited alluvion as the Mississippi moved back eastward. The court ruled that Walker Lands owns Gassoway Lake, the drainage ditch and the surrounding lands to the Mississippi River. The court reversed

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[4] The map is Plaintiff's Exhibit 8(a) published by the United States Geological survey (1994). The exhibit was originally filed as Exhibit 6(a) but, along with Exhibit 6, was renumbered when it was discovered that there was already an Exhibit 6.

the trial court's granting of an injunction prohibiting the public's use of the waters.

In its opinion, the court observed that at this point in its course, the Mississippi River's ordinary low water mark is 77 feet and its high water mark is 112 feet. The court noted that the Mississippi River levee sits at the western side of Gassoway lake. The channel of the Mississippi River is approximately three and a half miles east of Gassoway Lake. The court further found as a fact that "Gassoway Lake remains landlocked during most of the year and is practically inaccessible by boat." The court also found that at low water (77 feet) the ditch is "mostly dry" but at the high water mark, the waters of the Mississippi submerge all[5] of the lands in dispute, including Gassoway Lake, all the way to the levee on the west side of the lake.

The state court refused to enjoin the public at large from using the lands, finding no legal authority authorizing such action. The court also pretermitted ruling on the existence of legal servitudes on the property, finding that there was no justiciable controversy as between the State and Walker Lands on that issue.

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[5] The topographic map in evidence in this proceeding shows that the elevation in a few places on the lands is higher than 112 feet. At oral argument counsel for plaintiffs suggested, in answer to the court's inquiry, that approximately 95% of the lands are under water at the high water mark of 112 feet. That suggestion appears consistent with the topographic map.

The dispute comes to this court, then, as one to determine plaintiffs' rights to go upon the waters when they cover all or part of the Walker lands.[6] In brief, plaintiffs define the issue as follows:

> "The plaintiffs are seeking a declaratory judgment that they have the right to navigate along the irregular shore of the Mississippi River, notwithstanding who might own the bank and shore of the mighty Mississippi River.[7]
>
> "There is one fundamental legal dispute in this case that will resolve this case either in favor of Plaintiffs and public use of the entire navigable and fishable Mississippi River or not. The legal dispute is whether the public, including the Plaintiffs, have the federal right or state right to navigate, fish and hunt, and otherwise exploit, enjoy and utilize the full water surface of the Mississippi river at its normal water heights."[8]

It is clear from plaintiffs' complaint and from their multiple briefs that plaintiffs seek to navigate on and to fish and hunt on water between the

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[6] From this point on in this opinion, "the Walker lands" will refer to the land as well as Gassoway lake and the other water bodies on the land, including, without limitation, Gassoway Lake, "the drainage ditch", Little Gassoway Lake, Bunch's Cutoff (to the extent it lies within the State of Louisiana), and Doe Lake.

[7] Plaintiffs' brief, Doc. #5, p. 5.

[8] Plaintiffs' brief, Doc. #55, p. 2.

ordinary low water mark and the ordinary high water mark of the Mississippi River. They do not seek authority to go upon dry land belonging to Walker Lands or others and do not seek to go upon waters which flood lands when the Mississippi rises above its ordinary high water mark of 112 feet.

The topographic map in evidence shows that the normal elevation of Gassoway Lake is 95 feet.

ANALYSIS

A Preliminary Procedural Matter

Defendant argues that this case is moot because plaintiffs' complaint and their briefs assert entitlement to relief only "until the Second Circuit rules". Had this court interpreted plaintiffs' claims to be so limited, there would have been no need to abstain and to stay this case until the state courts had issued a final ruling. Plaintiffs' complaint anticipated that the state courts might decide the issues presented here. For example, in paragraph 28 plaintiffs assert that they "desire that this Honorable Court grant a declaratory judgment that until the Judgment of March 5, 1999, of the Second Circuit Court of Appeals is reversed, modified or a subsequent final judgment is rendered by a court of competent jurisdiction, specifying the ownership and navigational rights of the State of Louisiana and Walker Lands, Inc. . . . there is not sufficient evidence to support a verdict of guilty . . . ". See, to the same effect, paragraph 29. In addition, the prayer of the complaint in paragraph 2

asserts entitlement to relief until a court specifies the navigational rights of the persons in interest. As pointed out above, the Second Circuit expressly pretermitted ruling on the issue of navigational rights. No other court has decided the issue. Therefore plaintiffs' claims are not moot and have been adequately pled.

Plaintiffs' Rights To Go Upon The Disputed Waters

Plaintiffs claim that, in the past, they have each been arrested or threatened with arrest for violating Louisiana's trespass laws if they go upon the water when it covers the Walker lands. This court accepts, as it must,[9] the finding of the state courts that Walker Lands owns the lands under discussion here. However, ownership is irrelevant to this proceeding, for Louisiana law provides a remedy for trespass even to one who is only a possessor of property. *Manzanares v. Meche,* 506 So. 2d 957 (La. App. 3rd C. 1987), writ den. 508 So.2d 822 (1987). The issue is whether plaintiffs have a right to go upon the waters covering the Walker lands, regardless who owns them.

Plaintiffs seek a declaratory judgment and injunction recognizing their asserted rights to go upon the waters of the Mississippi river between its ordinary low water stage and its ordinary high water stage to navigate, fish and hunt. Plaintiffs claim

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[9] *Harper Macleod Solicitors v. Keaty & Keaty,* 260 F.3d 389 (5th C. 2001).

these rights are granted by federal law, specifically the Federal navigational servitude, and by Louisiana state law.

a) Plaintiffs' Rights under Federal Statutes and The Federal Navigational Servitude

When Louisiana was admitted to the Union, on equal footing with the original thirteen states, Louisiana received ownership of all navigable waters within its borders and all tide waters and the lands under them from the United States in public trust.[10] See *Phillips Petroleum Co. v. Mississippi,* 108 S. Ct. 791 (1988); *Dardar v. Lafourche Realty Co., Inc.,* 985 F.2d 824 (5th C. 1993). A condition of its admission was that the Mississippi river and all navigable rivers and waters leading into it "shall be common highways and forever free . . . " Act of Congress February 20, 1811, 2 U.S. Stats. 641, Act of Congress April 8, 1812, 2 U.S. Stats. 701. Current law provides that "[a]ll the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways." 33 U.S.C. § 10. In *The Daniel Ball,* 77 U.S. 557, 19 L. Ed. 999 (1870), the Supreme Court said: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when

[10] However the federal common law public trust doctrine probably does not provide this court with subject matter jurisdiction. *State of New York v. DeLyser,* 759 F. Supp. 982 (W.D. New York 1991).

they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." See also 16 U.S.C. § 796. This court takes judicial notice that the Mississippi River was navigable in 1812 and remains so today. See *State of Arizona v. State of California,* 51 S. Ct. 522 (1931). The parties do not dispute the navigability of the Mississippi River.

i) Federal Statutes

Plaintiffs argue that their asserted right to navigate on and to fish and hunt on waters of the Mississippi is recognized by the Federal navigation statutes and is also a "subset" of the Federal navigational servitude.

The Federal navigation statutes are found in 33 U.S.C. § 1, et seq. Plaintiff points specifically to 33 U.S.C. § 10 which provides:

> "All the navigable waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways."

This provision codifies the Act of Feb. 20, 1811, mentioned above.

While the obvious intent of this provision is to ensure the public's right to navigate on the navigable waters, the extent of those rights is not set forth in the statute or in other Federal statutes we have found or to which we have been referred by counsel. Unquestionably, the Federal government may, pursuant to the Commerce Clause, constitutionally regulate the extent of those rights and it has chosen to do so to some extent as will be discussed below. Similarly, Louisiana retains the right to regulate such bodies within its borders pursuant to its ownership of the water bottoms obtained upon its admission to the Union. The fact that the navigable waters, including the Mississippi, shall remain a public highway, however, does not preempt Louisiana's power to regulate them. *Cummings v. City of Chicago,* 23 S. Ct. 472 (1903); *Wood Marine Service, Inc. v. City of Harahan* 858 F.2d 1061 (5th C. 1988). Louisiana, too, has chosen to regulate its navigable waters as will also be discussed below. However, I do not find that 33 U.S.C. § 10 grants to plaintiffs the right to fish or hunt on navigable waters in Louisiana nor does it, standing alone, define the extent of the plaintiffs' rights to use the waters as a public highway. For that we must look to other state and federal laws, as will be discussed.

ii) The Federal Navigational Servitude

In general, all persons have the right to use open navigable waters. *Gibbons v. Ogden,* 6 L. Ed. 23 (1824); *Gray v. Bartlett,* 37 Mass. (20 Pick.) 186 (1838). The public right of navigation "entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as for carrying persons or property for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common." *Silver Springs Paradise Co. v. Ray,* 50 F.2d 356 (5th C. 1931) [so-called old Fifth Circuit]. However, certain otherwise navigable waters located on private property and constructed with private funds are nevertheless not subject to public use. See, e.g. *Kaiser Aetna v. United States,* 100 S. Ct. 383 (1979); *Vaughn v. Vermillion Corporation,* 100 S. Ct. 399 (1979). While it has been implied that the right of the public to use certain navigable waters depends upon the existence of the federal navigational servitude,[11] the Federal navigational servitude does not define the parties' rights to use the navigable waters, but is

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[11] In *Dardar v. Lafourche Realty Co., Inc.,* 985 F.2d 824 (5th Cir. 1993), the court of appeal had before it a suit by commercial fishermen seeking recognition of their right to fish upon waters they claimed were navigable. The court remanded the case for a determination whether a federal navigational servitude existed on some of the waters at issue and thus did not reach the issue of plaintiffs' asserted rights to fish in the waters. See also, *United States v. Harrell,* 926 F.2d 1036 at 1040 (11th C. 1991).

more "an expression of the notion that the determination whether a [eminent domain] taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation." *Kaiser Aetna v. United States,* 100 S. Ct. 383 (1979).

Early in our nation's history our Supreme Court held that the power to regulate commerce necessarily includes power over navigation. *Gibbons v. Ogden,* 6 L. Ed. 23 (1824). In *United States v. Rands,* 88 S. Ct. 265 (1967) the Court observed:

> "The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.' Gilman v. City of Philadelphia, 3 Wall. 713, 724-725, 18 L. Ed. 96 (1866). This power to regulate navigation confers upon the United States a 'dominant servitude' FPC v. Niagra Mohawk Power Corp., 347 U.S. 239, 249, 74 S. Ct. 487, 493, 98 L.Ed. 6886 (1954), where extends to the entire stream and the stream bed below ordinary high water mark." (Emphasis added).

See also, *United States v. Cherokee Nation of Oklahoma,* 107 S. Ct. 1487, 1490 (1987); *United Texas Transmission Company v. United States Army Corps*

of Engineers, 7 F.3d 436 (5th Cir. 1993); *United States v. 119.67 Acres of Land,* 663 F.2d 1328 (5th Cir. 1981).

The comprehensive nature of Congress' regulatory authority over national waters was more fully described in *United States v. Appalachian Power Co.,* 61 S. Ct. 291 (1940) at 308:

> "[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. . . . [The] authority is as broad as the needs of commerce. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted to the Federal Government." See also *Kaiser Aetna et al v. United States,* 100 S. Ct. 383 (1979).

From the Federal government's power to control all navigable waters of the United States comes the dominant "navigational servitude" which extends to all areas below the ordinary high water mark. *Cherokee Nation of Oklahoma,* 107 S. Ct. 1487 (1987); *United States v. 119.67 Acres of Land,* 663 F.2d 1328 (5th C. 1981); *United Texas Transmission Company v. United States Army Corp of Engineers,* 7 F.3d 436 (5th C. 1993).

Federal law defines high water mark differently than does Louisiana law.[12] "Ordinary high water mark is defined in 33 C.F.R. § 329.11, concerning the jurisdiction of the Army Corp of Engineers, to be "the" line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of the soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas." In *Goose Creek Hunting Club, Inc. v. United States,* 518 Fed 2d 579 (Ct. Cl. 1975), the court noted that "[j]udicial decisions indicate that the ordinary high-water mark can be variously defined – e.g., as the line where the water stands sufficiently long to destroy vegetation below it (*Kelley's Creek and Northwestern R.R. v. United States, 100 Ct. Cl. 396, 406 (1943)*); or as the line below which the soil is so usually covered by water that it is wrested from vegetation and its value for agricultural purposes destroyed (*Harrison v. Fite,* 148 F. 781, 783 (8th C. 1906)); or as the line below which the waters have so visibly asserted their dominion that terrestrial plant life ceases to grow and, therefore, the value for agricultural purposes is destroyed (*Borough of Ford City v. United States,* 345 F.2d 645, 648 (3rd C. 1965), cert. denied, 382 U.S. 902, 86 S. Ct. 236, 15 L.Ed2d 156 (1965)); or as the line below which the soil is kept bare of vegetation by

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[12] See p. 16.

the wash of the waters of the river from year to year in their onward course (*State of Oklahoma v. State of Texas,* 260 U.S. 606, 632, 43 S. Ct. 221, 67 L.Ed.2d 428 (1923)).”[13]

Unquestionably, the rights of the United States extend to the Constitutional purposes of commerce, navigation (including the navigational servitude), national defense, and international affairs. 43 U. S. C. 1314 (Submerged Lands Act). The navigational servitude “is an extremely old concept – owners of property or property rights *within navigable waters* take those rights fully cognizant of their limited nature.” *Coastal Petroleum Co. v. United States,* 524 F.2d 1206, 1209 (5th Cir. 1975) and cases cited therein.

Despite these observations on the wide reach of the Federal government when it comes to regulating navigable waters for commerce, navigation, national defense and international affairs, I have found no authority, and plaintiffs have directed the court to none, for the proposition espoused by plaintiffs that the Federal navigational servitude operates to grant persons the right to fish or hunt on navigable waters. Once again, the Federal navigational servitude is only “an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the

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[13] Compare, as to tidelands, *Borax Consolidated, Ltd. v. City of Los Angeles,* 56 S. Ct. 23 (1935).

flow of interstate waters that in their natural condition are in fact capable of supporting public navigation." *Kaiser,* supra.

Therefore, I find that the Federal navigational servitude does not provide plaintiffs with the right to fish or hunt on the Mississippi River.

However, I find that, because the Mississippi river is a navigable waterway, there is a federal common law right of navigation which includes the right to reasonably use the Mississippi's waters for the purposes, among other things, of navigation including travel and transportation, commerce, boating, sailing, and fishing and hunting from boats. See *Gibbons,* supra; *Silver Springs Paradise Co.,* supra. These rights apply laterally across the entire surface of the river [33 U.S.C. 1, 3; 33 CFR § 329.4 (1978)] to the high water mark.[14]

Walker Lands cites *Zunamon & Chicago Mill & Lumber Co. v. U.S.,* 221 Ct. Cl. 835 (Ct. Cl. 1979) which in turn cites *Goose Creek Hunting Club, Inc. v. United States,* 518 F.2d 579 (Ct. Cl. 1975), and *United States v. Harrell,* 926 F.2d 1036 (11th Cir. 1991), in support of its argument that the subject waters are not navigable and thus not subject to public use. However, in *Zunamon,* the court was unable to determine whether or not the disputed area was within the bed (as defined by Federal law which includes the

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[14] As defined by Federal law.

"bank"). In *Goose Creek,* the court found that the area in dispute was outside the ordinary high water mark of the river and thus not subject to government use without compensation. Likewise, in *Harrell,* the court held that the government's navigational servitude did not extend past the high water mark. The reasoning of all three cases is consistent with the analysis here.

b) Plaintiffs' Rights Under Louisiana Law

i) Legal precepts

In Louisiana, ownership of things is dependent on their designation as common, public or private. La. CC Art. 448. Public things are owned by the State and include running waters and the waters and bottoms of natural navigable water bodies, the territorial sea and the seashore. La. CC Art. 450. Public things are subject to public use, laws and regulations. La. CC. Art 452. Private things are owned by individuals but may be subject to public use. La. CC Arts. 453, 455.

A river consists of three things: the running water, the bed, and the banks. Yiannopoulos, Louisiana Civil Law Treatise, Property, 3rd Ed., Ch.5, §84; *State v. Richardson,* 72 So. 984 (1916). The waters are a public thing. La. CC Art. 450; La. R.S. 9:1101. Likewise, the bed of the river below the mean low watermark is a public thing. Yiannopoulos, Louisiana Civil Law Treatise, Property, 3rd Ed., Ch.4, §74; *Wemple v. Eastham,* 150 La. 247, 90 So. 637 (1922). The water and the bed are public things which may

not be privately owned. *Mayor of New Orleans v. Metzinger,* 3 Mart. (O.S.) 296, 303 (La. 1814). The banks of navigable rivers are private things subject to public use. La. CC Art. 456. Ordinarily, the bank belongs to the riparian landowner. See Comment (b) to La. CC Art. 456. The bank of a river is defined as the land lying between the low water stage of the river and the high water stage. La. CC Art 456. However, where there is a levee in proximity to the water, the levee is the bank. Id.

When Louisiana was admitted to the Union, it received title to all lands of navigable rivers, including the Mississippi River, below the then high water mark. *Pollard v. Hagan,* 44 U. S. 212 (1845); *State v. Placid Oil Co.,* 300 So.2d 154 (La., 1974). The state has the right, therefore, to fix titles and boundaries as to riparian owners. *Pollard,* supra; *Placid Oil,* supra.

The banks of a river are defined by Louisiana law as the land lying between the ordinary low stage and the ordinary high stage of the water. CC Art. 456. The high water stage is determined by calculating the mean annual high of the river, rather than observing physical markings. *DeSambourg v. Board of Commissioners, et al,* 608 So.2d 1100 (La. 4th C. 1992).[15] It is the highest stage that the river usually reaches at any season of the year. *Wemple v. Eastham,* 90 So.

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[15] In this regard, the definition of high water differs from the Federal law. See discussion, p. 12-13.

637 (1922). Under Louisiana law, the bed is the land covered by water at the river's ordinary low stage. Id.[16]

Private ownership of the banks of a navigable river in Louisiana "is not inconsistent with the navigability of the body or stream. Nor is navigability affected by such ownership; such ownership and the full enjoyment thereof may be somewhat impaired by reason of the superior rights of the Government and the public to the unhampered use of the water above them for navigation, commerce or fishing." *D'Albora v. Garcia,* 144 So. 2d 911 (La. App. 4th C. 1962). This impairment of the landowner's rights is not substantially different from that occurring where the Federal navigational servitude is present. See *Rands,* 88 S. Ct. at 266; *Lambert,* 835 F. 2d at 1111. Those acquiring riparian rights in Louisiana take their lands subject to the rights of public use set forth in La. C.C. Art. 456 and those applicable to the waters themselves recognized in *D'Albora* and in La. C.C. Arts. 450 and 452. "The riparian owner may use the running water for his purposes, but he may not interfere with, nor prevent its use by the general public." La. C.C. Arts. 657 and 658; Yiannopoulos, 2

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[16] Federal law considers the term bed to include the bank, that is to include the land up to the ordinary high water mark, a term defined by Federal law and which differs from the state law definition of high water mark. See as to bed, *Rands,* 88 S. Ct. at 266; *United States v. Kansas City Life Ins. Co.,* 70 S. Ct. 855 (1950); *United States v. Willow River Power Co.,* 65 S. Ct. 761 (1945).

La. Civ. Law Treatise §36, 99 *et seq.* (2d ed. 1980). "Therefore, the possessor of the bed, or owner for that matter, may not fence or enclose the 'land' so as to impede the use of the flowing water." *Chaney v. State Mineral Board,* 444 So.2d 105, 108 (La 1983). The same holds true as to the bank of the river. See La. CC Art. 450.

The Louisiana Civil Code clearly grants to the public the right to use the State's "running waters" and "waters" of natural, navigable rivers. La. CC Art. 450, 452. Those waters remain public regardless of their stage, that is whether they are at low water mark, high water mark or somewhere in between.

ii) "Everyone has the right to fish in the rivers. . . . "[17]

The Louisiana Supreme Court has recognized that "[t]he public has a traditional right to fish from boats in the navigable waters of the state." *State v. Barras,* 615 So.2d 285 (La. 1993). In *Barras,* the Louisiana Supreme Court considered the case of two commercial crawfishermen who were convicted of trespass in violation of La. R.S. 14:63.3, for remaining on property belonging to another after being forbidden. The two men had only been seen on the property, which was near the Atchafalaya River, in boats. At least one of the two was seen entering a canal on the

[17] La. CC Art. 452

property and fishing in a "slew". The Supreme Court noted that "the public has a traditional right to fish from boats in the navigable waters of the state" and cited La. CC Art. 452, Yiannopoulos, supra, § 58, and 33 U.S.C. § 10. The trial court found that, although the area where the two men were fishing was inside the levees, it was not on the banks. The court of appeal stated that the property was part of the Atchafalaya River's flood plains. The Supreme Court found that the record supported both conclusions and found it determinative that the two defendants were crawfishing on "flooded swamp land," not on the banks of a navigable stream or in navigable waters. Justice Dennis (now Circuit Judge) dissented, pointing out that the state had failed to prove that the area was not part of the bank of the river and thus subject to public use.

Barras is instructive in that it, like La. CC Art 452, recognizes the public's right to fish[18] from boats in the navigable waters of the state.

Barras is also important in another respect: The court held "[t]he Barras brothers were crawfishing on flooded swamp land, not on the submerged banks of a navigable stream or in navigable waters." Therefore, the decision turned on whether the defendants were or were not fishing within the banks of the river, that is, fishing on waters between the ordinary low water mark and ordinary high water mark of the river.

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[18] Fish are the property of the state. La. R.S. 56:3.

Barras, like the instant case, also involved other bodies of water located on the area argued to be banks.

The sheriff argues that this court should adopt the position that "lands occasionally flooded by navigable streams or rivers may be subject to a navigational servitude, but the purposes of this servitude do not include hunting or fishing on waters temporarily covering private property." In support, the sheriff cites *Edmiston v. Wood,* 566 So.2d 673 (La. App. 2nd Cir. 1990) for the proposition that private land does not become subject to unlimited public use when backwaters flood it. *Edmiston* is easily distinguished. In *Edmiston,* plaintiffs argued that, when they duck hunted in a boat on waters near the Mississippi River, they were simply making use of the navigable body of water. The court found, however, that the waters on which they hunted were not over the banks of the river but were on waters *above* the ordinary high stage of water and, therefore, they were not subject to public use of any kind.

Defendant also cites *Warner v. Clarke,* 232 So.2d 99 (La. App. 2nd C. 1970).[19] However, *Warner* is distinguishable because it involved plaintiffs who wanted to go upon riparian land to hunt and fish. It did not involve persons seeking to use only the waters of the Mississippi.

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[19] Coincidentally, *Warner* also concerned lands located in East Carroll Parish.

Walker Lands cites *Buckskin Hunting Club v. Bayard,* 868 So.2d 266 (La. App. 3rd C. 2004) in support of its argument that the Walker lands are not subject to public use. The case involved the plaintiff's request for an injunction to prohibit hunters from entering property in the Atchafalaya basin which it leased for its hunting club. While it is difficult to determine from the court's opinion whether the alleged trespassers there were found on land or water, it appears that most likely they used both. The court correctly ruled that the dry banks of a navigable river may not be used by the public for hunting. It also ruled that the man-made private canals located on the property could not be used. The court also found that there was a difference between the banks of a navigable river and its flood plains, presumably finding that the lands at issue were not within the banks of the river as defined by Louisiana law. The Buckskin case is consistent with the reasoning and analysis here: the public has a right to use the waters of a navigable river within its banks, that is, up to its high water mark, but has no right to use waters beyond the bank nor to use the dry bank for hunting.[20]

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[20] Walker Lands also spends much time in its brief arguing that this court must treat the issues in the Louisiana Second Circuit proceedings as res judicata and not allow re-litigation of issues determined there. I agree. The Second Circuit affirmed the trial court's determination as to the manner in which Gassoway lake was created and its ownership in Walker Lands, and that Gassoway lake and the drainage ditch were not

(Continued on following page)

Finally, La. R.S. 56:640.3 recognizes Louisiana's public policy "that all citizens of the state have a right to fish in and otherwise enjoy marine waters as long as they are in compliance with current licensing requirements." The statute further "recognizes continued public access to fishing opportunities in marine waters." Although the statute applies to marine waters, it evidences Louisiana's strong public policy regarding citizens' rights to fish in public waters.

Based on the foregoing, I find that the public has the right under Louisiana law to use the waters of this navigable river, the Mississippi, up to the

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navigable. Although the trial court enjoined the public from access to the property and waters based on its determination that no servitudes or other rights to enter the property existed, the court of appeal reversed that part of the judgment and refused to enjoin the public or the State. It found no justiciable controversy between the State and Walker Lands and specifically "pretermit[ted] discussion of the available use of these legal public servitudes during times of high water." The issues before this court were not decided by the Second Circuit and thus have not been re-litigated. It is therefore not necessary to determine the extent to which res judicata, including claim preclusion (res judicata) or collateral estoppel (issue preclusion) might otherwise apply. See *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385 (5th Cir. 2004). However, I note that the parties are not the same nor are they in privity. Although Walker Lands argues that the plaintiffs here and the State in the state court proceeding are in privity, the fact is that the very reason the Second Circuit refused to enjoin the State or the public and pretermitted a ruling on the applicability of legal servitudes during times of high water was because it found that the State (unlike the plaintiffs here) had not attempted to go upon the property or seek access to it.

ordinary high water stage (as defined by Louisiana law) which is 112 feet as found by the Louisiana Second Circuit. The public uses must be reasonable[21] but, like the federally recognized rights to use navigable waters discussed above must include, at the very least, those traditional uses of navigation (including travel and transportation), commerce, boating, sailing, and fishing and hunting from boats.[22]

The right to use the river's waters includes the right to use the entirety of the waters, regardless the river's level or stage or how much of its bank it covers. It is nonsensical to suggest that persons may use that portion of the water covering the bed and a part of the bank when the water is at its usual or normal stage, somewhere between low and high water stage, but cannot use the waters when they rise to cover any additional portion of the bank. Were the law to adopt such a rule, an unreasonable and, indeed, impossible burden would be placed on the public to ascertain, at any given point in time, just where on the surface of the water the boundary between the bed and the bank lay at any given point along the river even at normal or usual stages of the river. The purpose of the law having recognized the bank as a private thing subject to public use is for the very reason that

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[21] *Phillips Petroleum Company*, 484 U.S. 469, 108 S. Ct. 791, 797 (1988).

[22] See, as to hunting migratory birds from a boat, 50 C.F.R. §20.21.

flowing rivers rise and fall with the seasons and the weather.

Neither does the fact that, at certain river stages, there may be visible on the bank lakes, bayous, ditches or other non-navigable water bodies or even privately owned man-made structures change the fact that the river may be used to its full extent – that is, even when it covers, in part or full, its banks and anything on them.

Walker Lands argues in its amicus brief that "[s]loughs, creeks, ditches, etc. that connect with navigable streams are not thereby made navigable if not used as highways of commerce and the navigation servitude is not applicable even if navigable waters back up into them", citing *Zunamon,* supra. However, plaintiffs' rights do not depend on the navigability of the ditches and other water bodies lying within the banks of the river, but rather devolve from the fact that the Mississippi itself is a navigable river and remains so to the high water mark regardless its water stage.[23] The river's character as a navigable river and the public's rights to use it do not change by the fact that, in rising, it may cover land, structures or other water bodies lying within its own banks.

In this case, plaintiffs have a right, under Louisiana law, to use the waters up to the high water stage

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[23] *Zunamon* denied summary judgment because the court could not determine whether the property was within the high water mark of the river or not.

as found by the Second Circuit of 112 feet. Although at that stage the Mississippi River's waters will, according to the topographic map, be at or against the levee, I do not find that the levee defines the bank in this case because it is not in proximity to the river (La. CC Art. 456), but is over 3½ miles away; rather the high water mark defines the upper limits of the bank in this case. In this case, however, it just so happens that the high water mark is at or against the levee.

Finally, the rights recognized herein are not predicated on any public right to use the banks of the river (which rights are limited – see CC Art. 456; La. Op. Att'y Gen. 96-257) but rather on the public's right to use the waters of the river itself even when it covers those banks in whole or in part.

Riparian owners and their predecessors in title, who chose to purchase riparian property, are charged with holding it subject to the rights of the public to use the river's waters as provided by Louisiana and Federal laws and subject to the rights of the Federal and State governments to regulate their use. Walker lands argues that it and its predecessors in title have owned the subject property in private ownership for a hundred and seventy years and that it has a right to limit access to it. What Walker Lands fails to acknowledge, however, is that its riparian land lies within the bank of the Mississippi river, a navigable river, and it and its predecessors in title chose to purchase the property subject to various rights in the Federal government, the State government, and the

public, including regulation for purposes of interstate and foreign commerce, navigation (including the Federal navigational servitude), national defense, certain limited rights under State law to use the banks and the public's rights to use the waters of the river.

The Civil Rights Act and Probable Cause

In the complaint filed December 17, 2001, and verified[24] by each plaintiff, plaintiffs seek damages for violation of their civil rights on account of their arrests. Each plaintiff alleges that he has been arrested on at least one occasion by the defendant sheriff.[25] Further, plaintiffs Roberts, Balch, and Watts have each filed affidavits as to the fact of their arrests. However, the dates of the arrests were not set forth.[26] By supplemental chronology, Document # 76, consented to by opposing counsel, plaintiff Gammill states that he was first arrested in 1996. Watts was

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[24] A verified complaint made on personal knowledge is competent summary judgment evidence. *Hart v. Hairston*, 343 F.3d 762, 764 (5th Cir. 2003); 28 U.S.C. 1746. See, as to personal knowledge, *Huckabay v. Moore*, 142 F.3d 233, 240 (5th Cir. 1988).

[25] Sheriff Shumate became sheriff on May 11, 1998.

[26] Plaintiff Watts filed a supplemental affidavit on October 5, 2006 alleging that he was again arrested on April 26, 2005, over 3 years after this suit was filed. However, the complaint has not been amended to include a claim for damages for that arrest.

arrested in 1997 and Rogers and Watts in 1999. Parm was arrested in 1999 and Balch in 1999.[27]

The sheriff is sued only in his official capacity. Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 2035 n.55 (1978). However, to be liable in one's official capacity under 42 U.S.C. § 1983, the defendant must have been delegated policy-making authority under state law. In essence, suing a party in his official capacity is duplicative of an action against the municipality for which the official serves as an agent. *City of St. Louis v. Praprotnik,* 485 U.S. 112, 125, 108 S.Ct. 915 (1988). Also, *Turner v. Houma Mun. Fire and Police Civil Serv. Bd.,* 229 F.3d 478, 483 (5th Cir. 2000).

Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, the entity's policy or custom must have played a part in the violation of federal law. *Hafer v. Melo,* 502 U.S. 21, 25, 112 S.Ct. 358, 361-362 (1991). In contrast, personal-capacity suits which seek to impose individual liability upon a government officer for actions taken under color of state law are recognized under Section 1983. *Hafer,* 502 U.S. at 25. A state official can be sued in his individual capacity and be held personally liable under § 1983 if it can be

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[27] Statute of limitations issues have not been raised.

shown that the official, acting under color of state law, caused the deprivation of a federal right. However, such persons are entitled to assert qualified immunity. *Hafer,* 502 U.S. at 25-31.

Also, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. *Turner,* 229 F.3d at 483. An official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Turner,* 229 F.3d at 484.

La. R.S. 33:9001, et seq., empower the sheriff to raise revenues to finance his facilities and services through the creation of a continuing legal entity in each parish known as a law enforcement district, whose corporate existence survives the term of office of any individual sheriff.[28] *Prator v. Caddo*

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[28] La.R.S. 33:9001 states:

"There is hereby created, in each parish except Orleans, a special district to be known as a law enforcement district for the purpose of providing financing to the office of sheriff for that parish. In the parish of Orleans such a special district is hereby created for the purpose of providing financing to the office of criminal sheriff. The provisions of R.S. 33:9002, 9003(D), 9007, 9008, and 9010 shall apply to the district created in the parish of Orleans. No other provisions of this Chapter shall be applicable thereto. The boundaries of each district shall be coterminous with the boundaries of the parish and the duly elected sheriff of the parish or in the parish of Orleans, the criminal sheriff or his successor shall be ex officio the chief executive officer of the district."

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Parish, 38,085 (La. App. 2 Cir. 1/28/04), 865 So.2d 932, 936.

Law Enforcement Districts were discussed in *City of Shreveport v. Caddo Parish,* 27,519 (La.App. 2 Cir. 6/23/95), 658 So.2d 786, 794-795:

"The law enforcement districts were created in 1976 to provide financing to the office of the sheriff in each parish. . . . Over time the powers of the law enforcement districts have been expanded to grant the sheriff the ability to raise funds related to jails. In 1988, LSA-R.S. 33:1422 was amended to add the following section:

"D. Notwithstanding the provisions of R.S. 33:4713, a sheriff and ex officio tax collector may purchase and equip such real property as is necessary in the performance of his duties, including but not limited to an adequate and safe jail. The ownership of such real property shall be vested in the parish law enforcement district.

"In 1989, LSA R.S. 33:9010 was amended to expand the law enforcement district's long-term borrowing powers to include the following provision:

"D. (1)(a) Each district is authorized to issue revenue bonds in order to obtain funds to acquire, construct, reconstruct, renovate, improve, replace, maintain, repair, extend, enlarge, lease, as lessee or lessor, purchase, or equip such immovable or movable property, including but not limited to jails, administration or office buildings, maintenance, storage or utility facilities, or any other facility, building, structure, equipment, or furnishings which may be of use or benefit to the district or to the applicable sheriff.

"However, these provisions are entirely discretionary. They are not mandatory, as are the obligations imposed upon the parish. While the sheriff may have the option of resorting to these fund-raising methods to secure funds for jails – with the approval of the voters – there is no mechanism in these statutes which requires him to do so."

Therefore, a suit against Sheriff Shumate in his official capacity is actually a suit against the East Carroll Parish Law Enforcement District.

a) Qualified Immunity

Sheriff Shumate asserts the defense of qualified immunity. The defense of qualified immunity protects a public official from both litigation and liability, absent a showing that the official violated a constitutional right that was clearly established at the time of the incident. *Woods v. Smith,* 60 F.3d 1161, 1164 (5th Cir. 1995), cert. den., 516 U.S. 1084, 116 S.Ct. 800 (1996). Qualified immunity cloaks a police officer with immunity from personal liability for discretionary acts which do not violate well established law. Officers have qualified immunity if their actions could reasonably have been thought consistent with the right they are alleged to have violated. *Richardson v. Oldham,* 12 F.3d 1373, 1380-81 (5th Cir. 1994), and cases cited therein. Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. *Hope v. Pelzer,* 536 U.S. 730, 122 S.Ct. 2508, 2515 (2002).

A § 1983 suit naming defendants in their "official capacity" does not involve personal liability to the individual defendant. The only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses. Officials sued in their personal capacities may assert personal immunity defenses such as objectively

reasonable reliance on existing law. *Hafer v. Melo,* 502 U.S. 21, 25, 112 S.Ct. 358, 362 (1991). However, qualified immunity attaches only to officials in their individual, not their official, capacities. *Foley v. University of Houston System,* 355 F.3d 333, 337 (5th Cir. 2003).

Neither the law enforcement district, nor Sheriff Shumate in his official capacity, are entitled to qualified immunity. *Owen v. City of Independence, Mo.,* 445 U.S. 622, 650, 100 S.Ct. 1398, 1415 (1980); *Foley,* 355 F.3d at 337.

b) Official capacity

In *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 689, 98 S.Ct. 2018, 2035 (1978), the Supreme Court held that, since there is no respondeat superior liability under Section 1983, a municipality may not be held liable under Section 1983 solely because it employs a tortfeasor. In *Board of Cty. Comm'rs of Bryan Cty. v. Brown,* 520 U.S. 397, 403-404, 117 S.Ct. 1382, 1388 (1997), the Supreme Court further held that a plaintiff seeking to impose liability on a municipality under Section 1983 is required to identify a municipal "policy" or "custom" that caused the plaintiff's injury. Locating a "policy" ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality. In *Barrett v. Kocher,* 127 Fed.Appx. 697,

2005 WL 752780 (5th Cir. April 4, 2005), the Fifth Circuit stated, "In narrow circumstances, even a single incident can establish an official policy 'where the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy or failure to train,'" quoting *Burge v. St. Tammany Parish,* 336 F.3d 363, 373 (5th Cir.2003), cert. denied, 540 U.S. 1108, 124 S.Ct. 1074, 157 L.Ed.2d 895 (2004).

State law guides the court's determination of identifying those officials whose decisions represent the official policy of the local government unit. *Craig v. St. Martin Parish Sheriff,* 861 F.Supp. 1290, 1301 (W.D. La. 1994), citing *Jett v. Dallas Independent School Dist.,* 491 U.S. 701, 737, 109 S.Ct. 2702, 2724 (1989). Under Louisiana law, the sheriff is a final policymaker. *Craig,* 861 F.Supp. at 1301, citing La. Const. Art. 5, § 27 ("[The sheriff] shall be the chief law enforcement officer in the parish."); La.R.S. 33:1435 ("Each sheriff . . . shall preserve the peace and apprehend public offenders.").

Plaintiffs allege that they were arrested for criminal trespass pursuant to La. R.S. 14:63[29] for being on navigable waters covering the Walker land.

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[29] The complaint erroneously refers to La. R. S. 14: 67, Theft. In brief, plaintiffs refer to La. R.S. 14: 63. However, there also exists another trespass statute: La. R.S. 14: 63.3. In brief, plaintiffs also argue the applicability of La. R.S. 14:63.12;

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The statute, La. R.S. 14:63, provides, in pertinent part:

"No person shall enter upon immovable property owned by another without express, legal, or implied authorization."

A police officer may arrest a person if he has probable cause to believe that person committed a crime. *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 1699 (1985); La. C.Cr.P. art. 213. The constitutional torts of false arrest, unreasonable seizure, and false imprisonment require a showing that there was no probable cause. *Brown v. Lyford,* 243 F.3d 185, 189 (5th Cir.), cert. den., 534 U.S. 817, 122 S.Ct. 46 (2001). Probable cause justifying an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense. *Michigan v. DeFillippo,* 443 U.S. 31, 37, 99 S.Ct. 2627 (1979); *Gladden v. Roach,* 864 F.2d 1196, 1199 (5th Cir.), cert. den., 491 U.S. 907, 109 S.Ct. 3192 (1989). Louisiana courts have explained it thus:

> "Probable cause to arrest exists when facts and circumstances within the arresting officer's knowledge and of which he has reasonable and trustworthy information are

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however, that statute was repealed in 2003, after plaintiffs' brief was filed in 2002.

> sufficient to justify a man of average caution in the belief that the person to be arrested has committed or is committing an offense. Although mere suspicion cannot justify an arrest, the officer does not need sufficient proof to convict. Probable cause must be judged by the probabilities and practical considerations of everyday life on which average men, and particularly average police officers, can be expected to act."

Brown v. Rougon, 552 So.2d 1052, 1056 (La. App. 1st Cir. 1989), writ den., 559 So.2d 121 (La. 1990), and cases cited therein.

There is scant evidence before the court as to the circumstances of plaintiffs' arrests. The verified complaint states that each plaintiff has been arrested "by the Defendant" (sheriff), but does not state whether that is literally true or whether the sheriff acted through his deputies.

In either event, the sheriff did not have probable cause to arrest the plaintiffs because the sheriff should have known that the plaintiffs were legally authorized to be upon the waters. La. R.S. 14:63. The sheriff was required to know that the Mississippi River is a navigable river and that federal and state law, as discussed in detail above, has long recognized

that the public has a right to use those waters to their full extent.[30]

Further, because plaintiffs had been arrested more than once, they have proven a policy or custom on the part of the sheriff to make arrests for trespass on the Walker lands without probable cause whenever the Walkers asked him to do so. See sheriff's affidavit, Ex. D, Doc. #12.

There are no genuine issues of material fact. Because the arrests were without probable cause to believe an offense had been committed, the sheriff violated the 4th amendment rights of the plaintiffs and is answerable to them for any damages they have sustained. The extent of those damages must be determined by additional motion or trial.

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[30] Plaintiffs claim the sheriff knew the district attorney would not prosecute anyone arrested for being on the water over the Walker lands because he believed the law was unsettled as to whether that constituted a trespass. That fact, if true, would constitute additional evidence that the sheriff knew he did not have probable cause to arrest the plaintiffs for trespass. Compare, *Brown v. Rougon*, 552 So.2d 1052, 1056 (La. App. 1st Cir. 1989), writ den., 559 So.2d 121 (La. 1990) (sheriff correctly relied on advice from the district attorney and landowner, that the general public did not have the right to use the canal, in deciding there was probable cause to arrest trespassers). However, the Sheriff correctly notes that the letter from the district attorney saying he would not prosecute was dated April 22, 2002, long after the arrests complained of.

Injunction

Plaintiffs seek an injunction against the sheriff enforcing the trespass laws with regard to them on the Walker lands. In brief, plaintiffs have advised the court that [one] laudable effect of this litigation has been the Sheriff's voluntary cessation of arresting people navigating on the waters in dispute in this matter. See Doc. #20 filed July 26, 2002. However, the supplemental affidavit filed by plaintiff Watts shows that the sheriff has at least arrested Watts since that time for trespass on these lands. See Doc. #50-2.

It would be improper for this court to enjoin Sheriff Shumate from enforcing the trespass laws with regard to the Walker lands. The Walkers are entitled to equal protection of the law; the sheriff must perform his job duties. Moreover, enjoining Sheriff Shumate from properly enforcing the trespass laws would not assist the plaintiffs in this matter, since the problem in this case has not been the proper enforcement of the trespass law, but rather arrests made without probable cause to believe the trespass law had been violated. Accordingly, plaintiff's request for injunctive relief, enjoining Sheriff Shumate from enforcing trespass laws over Walker lands, should be denied. Likewise, enjoining Sheriff Shumate from falsely arresting plaintiffs for being upon the water over Walker lands would also be inappropriate. If Sheriff Shumate persists in violating plaintiffs' constitutional rights, their recourse is in this court.

State Law Claims for False Arrest/False Imprisonment

Louisiana state law recognizes the tort of false arrest. *Alvarado v. Poche,* 2002-2 (La. App. 3d Cir. 6/5/02), 819 So.2d 1150, 1152. In order for a plaintiff to recover for false arrest, he must prove that he was unlawfully detained by the police against his will. Thus, two elements are required to prove a case in false arrest and imprisonment: (1) detention of a person, and (2) unlawfulness of the detention. *Dumas v. City of New Orleans,* 2001-0448 (La.App. 4 Cir. 12/05/01), 803 So.2d 1001, 1003, writ den., 2002-0024 (La. 3/15/02) 811 So.2d 912, citing *Harrison v. State Through Dept. of Public Safety and Corrections,* 97-1086 (La. 12/1/98), 721 So.2d 458, 461; *Hughes v. Gulf International,* 593 So.2d 776, 780 (La. App. 4th Cir. 1992), writ den., 595 So.2d 658 (La. 1992). As discussed at length above, the sheriff arrested the plaintiffs, or authorized their arrest, without probable cause to believe a crime had been committed. Therefore, Sheriff Shumate should be held liable to plaintiffs under state law, as well, for any damages plaintiffs prove.

CONCLUSION

For the foregoing reasons, IT IS RECOMMENDED that:

1) Plaintiffs' motion for summary judgment (Doc. #5) be GRANTED and defendant's motion (Doc. #11) be DENIED and that JUDGMENT be entered DECLARING that, under federal and state law,

plaintiffs are entitled to reasonably use the waters of the Mississippi from the ordinary low water mark to the high water mark as defined by Federal and State law which use includes at the least, the purposes of navigation (including travel and transportation), commerce, boating, sailing, and fishing and hunting from boats;

2) Plaintiffs' request for injunctive relief be DENIED.

3) JUDGMENT be entered in favor of plaintiffs and against the sheriff, finding the arrests of the plaintiffs were without probable cause, in violation of both 42 U.S.C. § 1983 and state law.

4) Further proceedings be held to ascertain the extent of plaintiffs' damages resulting from their illegal arrests.

OBJECTIONS

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed.R.Civ.P. 72(b), the parties have ten (10) business days from service of this Report and Recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the district judge at the time of filing. Timely objections will be considered by the district judge before he makes his final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT UPON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UN-OBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED in chambers, in Alexandria, Louisiana, on this the 21st day of April, 2006.

/s/ James D. Kirk
JAMES D. KIRK
United States Magistrate Judge

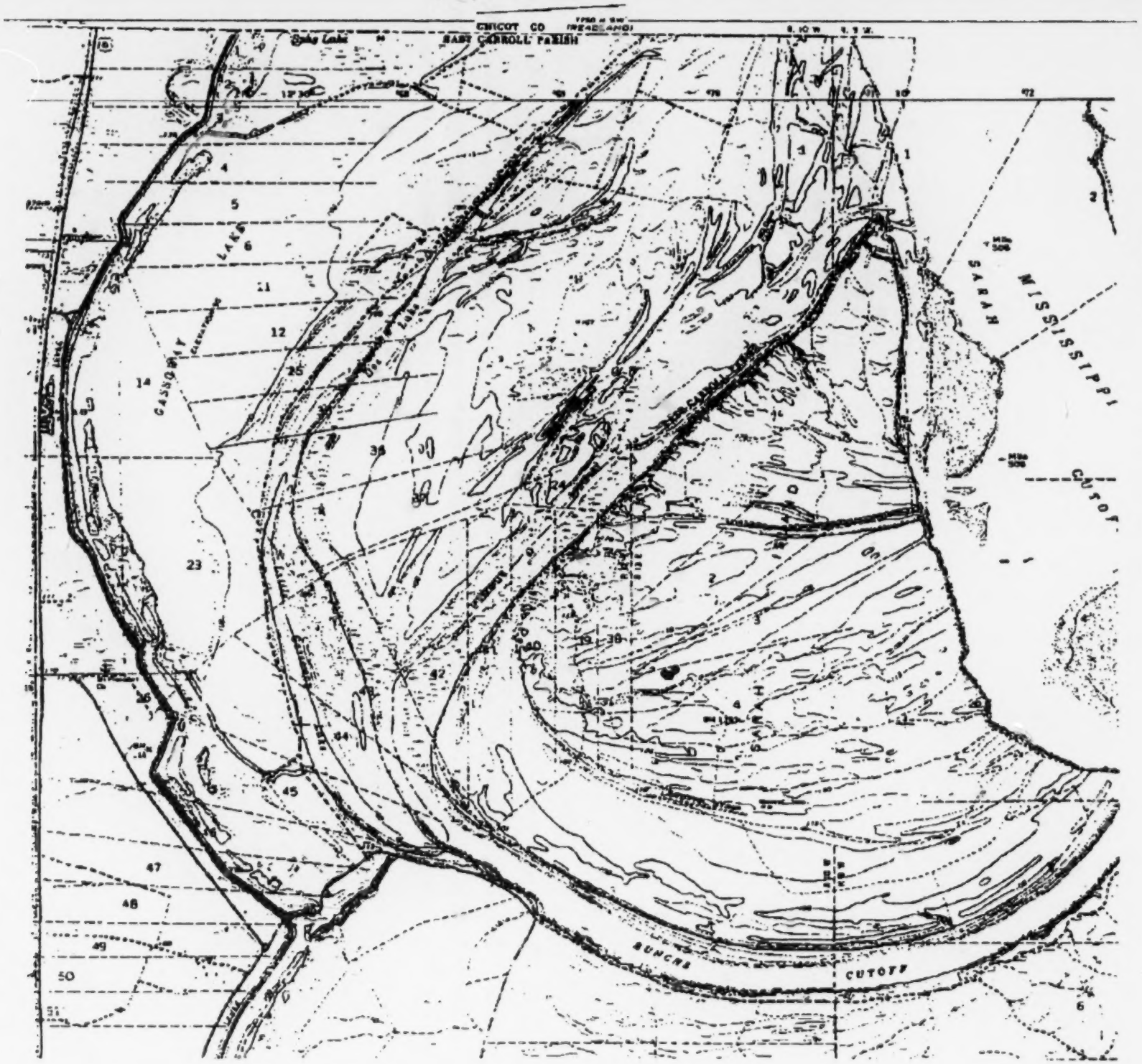

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-31045

NORMAL PARM, JR; HAROLD EUGENE WATTS; ROY MICHAEL GAMMILL; WILLIAM T ROGERS; ROBERT ALLEN BALCH

Plaintiffs-Appellants

v.

MARK SHUMATE, in his official capacity as Sheriff of East Carroll Parish

Defendant-Appellee

Appeal from the United States District Court for the Western District of Louisiana, Monroe

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ON PETITION FOR REHEARING EN BANC

(Filed Jan.28, 2008)

(Opinion 12/28/07, 5 Cir., ___, ___ F.3d ___)

Before KING, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

TITLE 33 – NAVIGATION AND NAVIGABLE WATERS CHAPTER II – CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY PART 329 – DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

§§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR parts 323 and 328.

§§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) Jurisdiction over entire bed. Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

(1) The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on

the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

* * *

WALKER LANDS, INC. and HOLLYBROOK LAND COMPANY, INC., Plaintiff-Appellee Versus EAST CARROLL PARISH POLICE JURY and THE STATE OF LOUISIANA, Defendants-Appellants

No. 38,376-CA

COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT

38,376 (La.App. 2 Cir. 04/14/04); 871 So. 2d 1258; 2004 La. App. LEXIS 977

April 14, 2004, Judgment Rendered

COUNSEL: LOUISIANA DEPARTMENT OF JUSTICE, By: Gary L. Keyser, Asst. Attorney General, for Appellant, State of Louisiana.

McGLINCHEY STAFFORD, PLLC, By: James C. Crigler, Jr., Constance Charles Willems, for Appellee, Walker Lands, Inc.

PAUL LOY HURD, for Waterways Access Association.

JUDGES: Before BROWN, CARAWAY & PEATROSS, JJ.

OPINION BY: PEATROSS

OPINION

This appeal arises from a trial court judgment in favor of Plaintiff Walker Lands, Inc. ("Walker Lands") and against Defendant State of Louisiana ("State"). The State now appeals the judgment of the trial court. For the reasons stated herein, we affirm in part, reverse in part and remand.

FACTS

On June 10, 1996, Walker Lands filed suit seeking an injunction against the East Carroll Parish Police Jury to stop all public use of Gassoway Lake and a drainage ditch which runs into the lake, both in the vicinity of the Mississippi River. In its lawsuit, Walker Lands also sought a declaratory judgment from the trial court declaring that Walker Lands is the owner of Gassoway Lake and that the lake and the drainage ditch are not subject to any right of public use.[1] Subsequently, the East Carroll Parish Police Jury filed a third-party demand against the State alleging that the State was an indispensable party to the suit, since it had a duty to defend title and access to alleged public lands.[2]

The State answered this lawsuit claiming the ownership and/or servitude to the bed, bottoms and waters of Gassoway Lake and the drainage ditch;[3]

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[1] This lawsuit has previously been before this court. *See Walker Lands, Inc. v. East Carroll Parish Police Jury,* 31,490, 738 So. 2d 205 (La. App. 2d Cir. 3/5/99), unpublished opinion, *writ denied,* 99-1181 (La. 6/4/99), 744 So. 2d 631. The previous decision in this case was our court's reversal of summary judgment which had been granted by the trial court for Walker Lands in determining ownership of Gassoway Lake.

[2] The East Carroll Parish Police Jury was later dropped from the suit. Hollybrook Land Co., Inc. was also an original party to this suit, but was later dismissed as well.

[3] Walker Lands refers to the gully that provides water to Gassoway Lake in times of high water as a drainage ditch. The State refers to the gully as an outlet channel. The pictures of the

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and, therefore, Gassoway Lake and the drainage ditch were subject to public use. The State and Walker Lands also claimed ownership of land that the State labels as an island, that sits between the lake and the Mississippi River.

A trial over these matters was held in 1999 and 2001. The trial court received extensive evidence from both parties concerning the creation and ownership of Gassoway Lake. At trial, it was determined that Gassoway Lake did not exist in 1812,[4] the year Louisiana was admitted into the Union. The land where Gassoway Lake now sits was either woods or farmland in 1812, west of the Mississippi River. When the Mississippi River shifted westward before approximately 1880, it flowed over this dry land. When the Mississippi River shifted eastward, private riparian landowners acquired the land, which includes Gassoway Lake and the drainage ditch, and have owned it ever since, with Walker Lands having purchased the land in 1974. Since 1960, all owners of the land and Gassoway Lake have prohibited access to it.

Dr. Richard Kesel, expert for Walker Lands, testified that, based on map evidence, data concerning the course and flow of the Mississippi River and

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gully in the record indicate that a more accurate term for it is a drainage ditch; therefore, this term will be used herein.

[4] By law, the State owns all bodies of water that were in existence within its borders in 1812. *See Texas v. Louisiana*, 410 U.S. 702, 93 S. Ct. 1215, 35 L. Ed. 2d 646 (1973); *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 (La. 1974).

other information, Gassoway Lake was in existence by 1894. During the 1860s and 1870s, the Mississippi River began moving in a westward direction toward the geographical site now occupied by Gassoway Lake. Dr. Kesel opined that the land was created through alluvion or accretion when the Mississippi River moved slowly and imperceptibly back eastward, leaving behind dry land and what is now Gassoway Lake in a shallow swale.[5] Gassoway Lake is a very shallow lake and its depth has not changed since its formation. Currently, the channel of the Mississippi River is approximately three and a half miles east of Gassoway Lake. Gassoway Lake remains landlocked during most of the year and is practically inaccessible by boat.[6] The lake only receives water when the Mississippi River floods, which causes water to run through the ditch and eventually spilling over into the lake. The drainage ditch runs from the southern end of Gassoway Lake to Bunch's Cutoff, another body of water. At low water, which is at 77 feet, the ditch is mostly dry and the land that sits between the lake and the Mississippi River is mostly dry. A levee on the land blocks the Mississippi River from flooding any more dry land west of Gassoway Lake. At times when the Mississippi River floods, the land owned by

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[5] A swale is a valley or low place; a tract of low and usually wet land. *Webster's Revised Unabridged Dictionary* (1913). A swale is a long, narrow, shallow, natural depression in the land.

[6] The western portion of Gassoway Lake is bounded by the main levee for the Mississippi River.

Walker Lands, including Gassoway Lake, is submerged under the waters of the Mississippi River, below the ordinary high water mark, which is 112 feet, all the way to the base of the levee. When the Mississippi River is not at an elevated state, however, the land and Gassoway Lake remains well above the ordinary low water mark of the Mississippi River.[7]

The trial court found that, according to the 1894 map, Gassoway Lake was formed as a shallow swale. In making such a finding, the trial court rejected the conclusion found in a Louisiana Attorney General Opinion[8] that Gassoway Lake was created as a result of a neck cut-off; the testimony of the State's expert, Dr. Paul Kemp, who opined that Gassoway Lake was created as a result of chute cut-off, as described in La. C.C. art. 503,[9] within the alluvial plain; and that the

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[7] This is an important fact and detrimental to the State's case, because, with respect to rivers and streams, the bed or bottoms of water which the State owns in her sovereign capacity is only the land covered by the water up to its ordinary low water stage. *See State v. Cockrell,* 162 So. 2d 361 (La. App. 1st Cir. 1964), *writ refused,* 246 La. 343, 164 So. 2d 350 (1964); *Esso Standard Oil Company v. Jones,* 233 La. 915, 98 So. 2d 236 (1957). In this case, if the State argues that the land and Gassoway Lake are within the bed of the Mississippi River, then its argument that it owns Gassoway Lake must fail because it is above the ordinary low water mark.

[8] *See* La. Atty. Gen. Op. No. 96-206.

[9] La. C.C. art. 503 provides:

When a river or stream, whether navigable or not, opens a new channel and surrounds riparian land

(Continued on following page)

lake was formed out of the former Mississippi River bed. Dr. Kemp testified that the area where Gassoway Lake is located was the main channel of the Mississippi River in 1881 and that, when the Mississippi River moved eastward, it left alluvion deposits against the west bank of the river, with Gassoway Lake as a feature within the alluvion build up, which cut it off from the Mississippi River, but that it remained a channel for the Mississippi River.

The trial court ultimately rendered judgment in favor of Walker Lands, concluding that Gassoway Lake and the drainage ditch are privately owned by Walker Lands because the lake and ditch are not navigable in fact; and, thus, not navigable in law. In addition, the trial court determined that certain land between Gassoway Lake and the Mississippi River was not an island and was owned by Walker Lands.[10] Further, the trial court found that the State has never claimed this land in the past and cannot now do so. Thereafter, the trial court entered a permanent injunction enjoining the State or the general public-at-large from going on or about Gassoway Lake, the land between Gassoway Lake and the Mississippi River and the drainage ditch which runs into the lake. The State now appeals the judgment of the trial

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making it an island, the ownership of that land is not affected.

[10] Please see the attached map of the property at issue in the appendix at the end of this opinion. This map was entered into evidence at the trial court as Plaintiff's Exhibit 47.

court, raising the following assignments of error[11] (verbatim):

> 1. The trial court erred in its adoption of the final judgment written by Walker which prohibits public navigation on waters of the Mississippi and awards Island No. 1, formed in the Mississippi, to Walker;
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> 2. The trial court erred in disregarding all relevant and competent evidence and in rendering a judgment contrary to the law of Louisiana and long standing public policy;
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> 3. The trial court erred in refusing to grant the State a suspensive appeal where all procedures were followed, and the trial court simply nullified the request without consent of the parties and a hearing; and
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> 4. The trial court erred in maintaining a TRO in effect from 1996 to present, despite the reversal of a prior judgment by the Court of Appeal, Second Circuit and remand to the trial court for a full trial.

DISCUSSION

It is well settled that a court of appeal should not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong. *Stobart v. State through Dept. of Transp. & Development,* 617

[11] The State makes more specific arguments in its brief.

So. 2d 880 (La. 1993). The reviewing court must do more than just simply review the record for some evidence which supports or controverts the trial court's findings; it must, instead, review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. *Id.* The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. *Cosse v. Allen-Bradley Co.,* 601 So. 2d 1349 (La. 1992). If the trial court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. *Housley v. Cerise,* 579 So. 2d 973 (La. 1991) (quoting *Sistler v. Liberty Mutual Ins. Co.,* 558 So. 2d 1106 (La. 1990)).

The State asserts that the evidence at trial showed that Gassoway Lake was created out of the former bed of the Mississippi River, it remains navigable and connected to the Mississippi River as a channel and is public water under the law. Further, the State contends that, when Gassoway Lake is below the ordinary high water of the Mississippi River, it is burdened by a navigation servitude, levee servitude and the public use. The State also charges that the trial court's judgment is overly broad.

Creation of Gassoway Lake

The central issue involved in this case is the creation of Gassoway Lake and the effect of the movement of the Mississippi River. La. C.C. art. 499 provides:

> Accretion formed successively and imperceptibly on the bank of a river or stream, whether navigable or not, is called alluvion. The alluvion[12] belongs to the owner of the bank, who is bound to leave public that portion of the bank which is required for public use.

The same rule applies to dereliction formed by water receding imperceptibly from a bank of a river or stream. The owner of the land situated at the edge of the bank left dry owns the dereliction.

Any alluvion and/or dereliction which forms along the banks of a river belongs to the riparian landowners, who own the land adjacent to the river, when the river shifts course. *Nevels v. State,* 95-0100 (La. App. 1st Cir. 11/9/95), 665 So. 2d 26; *Davis Oil*

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[12] Alluvion may be defined as an addition to riparian land, gradual and imperceptible, made by the water to which the land is contiguous. The test as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. *Esso Standard Oil Company, supra.*

Company v. Citrus Land Company, 576 So. 2d 495 (La. 1991). Moreover, La. C.C. art. 504 provides:

> When a navigable river or stream abandons its bed and opens a new one, the owners of the land on which the new bed is located shall take by way of indemnification the abandoned bed, each in proportion to the quantity of land that he lost.
>
> If the river returns to the old bed, each shall take his former land.

At trial, it was established that Walker Lands' predecessors-in-title were the riparian landowners of the property that sat at the bank of the Mississippi River when it changed course sometime after 1880 and began shifting back eastward, leaving behind dry land and standing water in a shallow swale in the land, what is now Gassoway Lake. Walker Lands' predecessors-in-title began to acquire, through alluvion,[13] new land that was created, when the Mississippi River shifted east. Dr. Kesel explained that Gassoway Lake was part of this creation of new land as the Mississippi River shifted eastward.

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[13] Alluvion and accretion are terms used synonymously. Accretion is defined as the act of growing to a thing; usually applied to the gradual and imperceptible accumulation of land by natural causes, as out of the sea or river. *Black's Law Dictionary* 20 (6th ed. 1990). Accretion is the addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of owner. The term alluvion is applied to the deposit itself, while accretion denotes the act.

Gassoway Lake and surrounding lands between the lake and the river are sometimes flooded by the Mississippi River. Privately owned land does not become part of a navigable body of water when a nearby navigable body of water overflows its normal bed and temporarily covers the property. *Edmiston v. Wood,* 566 So. 2d 673 (La. App. 2d Cir. 1990); *Buckskin Hunting Club v. Bayard,* 03-1428 (La. App. 3d Cir. 3/3/04), 868 So. 2d 266, 2004 La.App. LEXIS 431, 2004 WL 385387. Gassoway Lake is landlocked and does not now lie in the bed of the Mississippi River, which is some three and one-half miles to the east; likewise, it is not a channel of the river, since it is cut off from it. Further, since Gassoway Lake is not a channel of the Mississippi River, the dry land between it and the Mississippi River is not an island, as claimed by the State. When the land that is now Gassoway Lake sat in the bed of the Mississippi River, the river bed was owned by the State as the bed of the Mississippi River and not as the bed of a separate navigable lake. The land and the lake, however, no longer sit in the bed of the Mississippi River.

We find that the land surrounding Gassoway Lake was formed through accretion/alluvion as the Mississippi River shifted course. Gassoway Lake formed due to water left behind in a swale in the land when the river shifted eastward. We note that the depth of the lake has not changed since its formation. This evidence supports the conclusion that the lake was formed in a swale and not through a chute or

neck cut-off. Applying La. C.C. art. 499 to the facts in the instant case, we further find that, as owners of the bank of the Mississippi River, Walker Lands' predecessors-in-title gained ownership of not only the newly formed dry land, but also the lake itself. The trial court heard the testimony of both Dr. Kesel and Dr. Kemp and found Dr. Kesel's theory of the shift in the Mississippi River and creation of Gassoway Lake to be more credible. After reviewing the evidence in its entirety, we find that the trial court's conclusion was a reasonable one. The trial court did not commit manifest error, nor was it clearly wrong in determining the manner in which Gassoway Lake was created.

Navigability and Ownership of Gassoway Lake

First, we note that the State cannot claim ownership of Gassoway Lake by basing its argument on La. R.S. 9:1101, as it asserts in its brief. La. R.S. 9:1101 provides, in pertinent part, that "The waters of all bayous, rivers, streams, lagoons, lakes and bays and the beds thereof, not under the direct ownership of any persons on August 12, 1910, are declared to be the property of the state." Walker Lands proved at trial that its predecessors-in-title owned the land encompassing Gassoway Lake on August 12, 1910. We find no merit in the State's argument in this regard. We also find no merit in the argument that the State owns Gassoway Lake because the State owns all bodies of water that were within its territory when it was admitted into the Union in 1812. Gassoway Lake

did not exist in 1812; and, consequently, this law would not apply.

Since the State only owns navigable bodies of water, it argues that Gassoway Lake and the drainage ditch are navigable. "Non-navigable lakes are private things. Accordingly, they may belong to . . . a private person." La. C.C. art. 506 cmt. c. A body of water is navigable in law if it is navigable in fact. *Ramsey River Road Property Owners Association, Inc. v. Reeves,* 396 So. 2d 873 (La. 1981). A body of water is navigable in fact if it is capable of being used for a commercial purpose over which trade and travel are or may be conducted in the customary modes of trade and travel. *Id.*

Non-navigable lakes are subject to the law governing dry lands. See La. C.C. art. 506 cmt. d. La. R.S. 9:1115.2 provides:

> A. Inland non-navigable water bodies are those which are not navigable in fact and are not sea, arms of the sea, or seashore.
>
> B. Inland non-navigable water beds or bottoms are private things and may be owned by private persons or by the state and its political subdivisions in their capacity as private persons.

Whether or not Gassoway Lake and the drainage ditch are navigable as they normally sit when they are not flooded by the Mississippi River depends on whether they are used in commerce. The trial court found that Gassoway Lake and the drainage ditch

were not navigable and we find no manifest error in that conclusion. At trial, the State attempted to prove that Gassoway Lake and the drainage ditch can be used for commercial purposes. The trial judge properly rejected this argument.

A body of water not connected to a navigable body of water and surrounded by land can serve no useful commercial purpose. *Fitzsimmons v. Cassity,* 172 So. 824 (La. App. 2d Cir. 1937). In *Fitzsimmons,* a shift in the Red River caused a shallow body of water to be left behind. This body of water had no connection with the Red River. The court found that the body of water "partakes more of a character of a shallow lake than it does a navigable stream" and it was owned by the private landowner and not the State.

In the case *sub judice,* the State argued that the rental of boats for fishing and other recreational purposes on Gassoway Lake was enough to find that the lake was being used for a commercial purpose to support navigability. Further, the State argued that the drainage ditch was navigable in fact. Recreational use of a body of water alone is not enough to say that the body of water is being used for a commercial purpose. Gassoway Lake is a non-navigable body of water that is owned by a private entity. It is a private thing. Moreover, the evidence in the record supports the conclusion that the drainage ditch remains completely dry for most of the year, making it unusable. The drainage ditch also cannot be used for a commercial purpose and it is a private thing. The trial court

did not commit manifest error and was not clearly wrong in finding that Gassoway Lake and the drainage ditch are not navigable bodies of water. Along with the land at issue before the trial court, Gassoway Lake and the drainage ditch are owned by Walker Lands and not the State.

Injunction

First, the State argues that the judgment is overly broad because it enjoins use of the Mississippi River. We do not agree. We have reviewed the specific language of the injunction and find that it does not enjoin use of the Mississippi River, which is obviously a public body of water and no one can prevent boaters from navigating it; however, the permanent injunction must fail on other grounds.

Although the issue of standing has not been raised on appeal, we must consider this issue since it is fundamental to the granting of relief, such as the issuance of an injunction. *Louisiana Dept. of Agriculture and Forestry v. Louisiana State Licensing Board for Contractors,* 36,694 (La. App. 2d Cir. 1/29/03), 837 So. 2d 726. Justiciable controversy has been defined as:

> "[a]n actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relation of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a

> legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Atchafalaya Basin Levee District v. Pecquet,* 364 So.2d 610 (La. App. 1st Cir. 1978).

A justiciable controversy is shown if there is a genuine controversy between a plaintiff and a defendant as to legal rights requiring a judicial determination. *Louisiana Dept. of Agriculture and Forestry, supra.*

In addition, under La. C.C.P. art. 3611, enforcement of an injunction is punishable as a "contempt of court." Such a contempt judgment, however, may only be obtained against the party/defendant against whom the action for injunction was brought.

In the case *sub judice,* Walker Lands and the State were the only parties involved in this lawsuit at trial and no other persons or private entities were involved; however, the trial judge issued a permanent injunction against not only the State's use of the property, but also the public's-at-large use of the property. The trial judge ordered, adjudged and decreed, in pertinent part, that:

> [T]he State of Louisiana, and its subdivisions or agencies, and any employee, juror, or agent thereof, and all other persons, including members of the public, (all these persons collectively "Persons"), be and are hereby permanently enjoined from entering upon the Property . . . , which Property includes

> all lands . . . and the bed, bottoms and waters of Gassoway Lake . . . whether or not any of the lands or water bodies on the Property are inundated by flood waters from the Mississippi River or any other water body, for any purpose whatsoever,. . . .
>
> All said Persons are further permanently enjoined from a) engaging in any conduct or activity which directly or indirectly encourages or permits other Persons, including members of the general public, to enter upon the Property described above, without Walker's or its successors-in-title express prior authorization; and b) from using such Property or authorizing, causing or encouraging anyone, other than Walker or its successors-in-title and their agents, invitees and licensees from using the Property, including the bed, bottoms and waters of Gassoway lake and the water body, (whether called a ditch, bayou, or outlet channel or otherwise) . . . for any purpose whatsoever,. . . .
>
> All said Persons are further permanently enjoined from using any portion of the Property, including the lands and any bed, bottoms and waters of any water bodies thereon, for any purpose whatsoever, unless they have express prior authorization of Walker or its successors-in-title.

Walker Lands cannot be given relief against a hypothetical public-at-large. It cannot have an injunction enforced against every individual person in the state when there is no actual dispute against

every individual person in the state. There is no genuine controversy between Walker Lands and every person in the State of Louisiana. After thorough research, we found no law or jurisprudence in this State that supports the conclusion that an entire hypothetical public-at-large can be enjoined by a court from doing an act.

Further, we find that there is no direct evidence in the record of any direct violation by State officials or departments of the State attempting to invade Walker Lands' property; and, therefore, there is no justiciable controversy between Walker Lands and the State that would warrant an injunction being issued against the State. Simply put, there is no genuine controversy between Walker Lands and the State over the issue of injunctive relief. Walker Lands does, however, have a right to prevent its private property from being exploited. It has the same rights as all other owners of private property against a person or entity who invades its land and that is to enforce its rights as a private landowner through use of the trespass statutes, to seek specific damages against a person or entity or to ask for an injunction against a specific person or entity, but only at the time that the person or entity invades its land.[14] Owners of private property may forbid entry to anyone for purposes of hunting or fishing and the like.

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[14] For example, *see Cenac v. Public Access Water Rights Association*, 02-2660 (La. 6/27/03), 851 So. 2d 1006; *Buckskin Hunting Club, supra*.

La. C.C. art. 3413. We hereby reverse the permanent injunction issued by the trial court.

Public Use Servitude

Finally, in support of its argument for ownership, the State raised the issue of the existence of legal public servitudes under La. C.C. art. 665[15] in favor of itself and the general public for the utility of the Mississippi River banks at times of high water and for levee maintenance purposes. The Civil Code's definition of the bank of a navigable river is the land lying between the ordinary low and the ordinal high stage of the water. See La. C.C. art. 456. The State, however, has not presented a justiciable controversy in this case showing that the State, through its agents in its propriety capacity, seeks to utilize any rights to these public servitudes. We likewise, therefore, pretermit discussion of the available use of these legal public servitudes during times of high water.[16]

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[15] La. C.C. art. 665 provides:

> Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.

All that relates to this kind of servitude is determined by laws or particular regulations.

[16] We do note that the jurisprudence in our state has long held that the public use servitude means that the public may use the bank of a river only for a navigational purpose. *See* La. C.C. art. 456 cmt. b; *Ward v. Board of Levee Com'rs of Orleans*

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Devolutive Appeal and Temporary Restraining Order

The State also argues that the trial judge unilaterally converted its motion for a suspensive appeal into a devolutive appeal. Further, the State asserts that the temporary restraining order (TRO) put into effect by the trial judge in the first decision in this case, which was later reversed by this court, should not have stayed in effect after the reversal.

First, we will address the devolutive appeal. A trial judge has discretion to issue a devolutive appeal. See La. C.C.P. art. 3612. In the instant case, the State requested a suspensive appeal, or in the alternative, a devolutive appeal. When the State submitted a draft order for the trial judge to sign, however, it mentioned only a suspensive appeal in the draft order. The trial judge marked out the word suspensive and wrote in devolutive, using the discretion allowed to him under our code of civil procedure. We find no merit to the State's third assignment of error.

Finally, the State claims that the TRO should not have remained in effect after the original decision was reversed by our court. In reviewing the record,

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Levee District, 152 La. 158, 92 So. 769 (1922), *cert. denied,* 260 U.S. 745, 43 S. Ct. 246, 67 L. Ed. 492 (1923); *Jefferson Parish v. Universal Fleeting Company,* 234 So. 2d 88 (La. App. 4th Cir. 1970). Fishing and hunting on flooded lands do not meet the definition of using the bank of a river at its high water mark for a navigational purpose. *See State v. Barras,* 615 So. 2d 285 (La. 1993); *Warner v. Clarke,* 232 So. 2d 99 (La. App. 2d Cir. 1970), *writ refused,* 255 La. 918, 233 So. 2d 565 (1970).

we found that the parties had agreed to maintain the TRO until the trial court rendered a decision over the merits of the permanent injunction. Likewise, we find no merit in the State's final assignment of error.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed as to the ruling that Gassoway Lake and its surrounding lands are owned by Walker Lands. The judgment of the trial court is reversed as to the permanent injunction. Costs of this appeal shall be divided equally between the parties. The total cost of this appeal was $167.50, of which half shall be assessed against the State of Louisiana through the Department of Justice, pursuant to La. R.S. 13:5112. The matter is remanded to the trial court for the calculation of trial court costs to be assessed equally against the parties.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX

MISSISSIPPI
RIVER
MILLIKIN QUAD
LOUISIANA-MISS
15 MINUTE SERIES

U.S. Geological Survey Map
MILLIKIN QUADRANGLE
Louisiana-Mississippi
7.5 Minute Series (Topographic)
(East Carroll Parish, Louisiana)

[Map Found In Pocket On Inside Back Cover]

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